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APPENDIX

In the Supreme Court of the United States

OCTOBER TERM 1974

No. 74-389
No. 74-428

ALBEMARLE PAPER CO., *Petitioner*

v.

JOSEPH P. MOODY, ET AL.

HALIFAX LOCAL 425, PAPERMAKERS AND PAPERWORKERS, *Petitioner*

v.

JOSEPH P. MOODY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONS FOR WRITS OF CERTIORARI FILED OCTOBER 3, 1974 AND OCTOBER 15, 1974 CERTIORARI GRANTED DECEMBER 16, 1974

In The

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Aug. 25, 1966—Plaintiffs' Complaint filed in U.S. District Court for the Eastern District of North Carolina, Wilson Division.

Sept. 26, 1966—Defendant, Halifax Local 425's Motion to Dismiss filed.

Sept. 26, 1966—Defendant, United Papermakers and Paperworkers International Union's Motion to Dismiss filed.

Sept. 28, 1966—Defendant, Halifax Local 425's Amended Motion to Dismiss filed.

Oct. 5, 1966—Defendant, Albemarle Paper Co.'s Motion for Summary Judgment filed.

Oct. 7, 1966—Defendant Albemarle Paper Co.'s Motion for Summary Judgment filed.

Nov. 22, 1966—Plaintiffs' Memorandum in Opposition to Summary Judgment filed.

Dec. 20, 1966—Defendants, United Papermakers and Paperworkers and Halifax Local 425's Motion for Summary Judgment filed.

Jan. 9, 1967—Plaintiffs' Response to Defendants United Papermakers and Paperworkers and Halifax Local 425 Motions for Summary Judgment and Motion to Dismiss filed.

July 26, 1967—Defendant, Albemarle Paper Co.'s Answer filed.

July 26, 1967—Defendant Albemarle Paper Co.'s Motion to Dismiss filed.

July 28, 1967—Defendant Halifax Local 425's Answer filed.

Nov. 24, 1967—Order and Memorandum Opinion entered denying Defendant, Albemarle Paper Co.'s Motion to Dismiss.

June 25, 1970—Plaintiffs' Motion to Add or Join Parties Defendant filed.

Aug. 20, 1970—Defendant, Albemarle Paper Co.'s Motion to Dismiss filed.

Sept. 29, 1970—Order and Opinion entered that Motion to Add or Join the Albemarle Paper Co., a Delaware Corporation, the Hoerner Waldorf Corp., the First Alpaco Corp., and the Ethyl Corp. is allowed and Motion to Dismiss on behalf of Defendant, Albemarle Paper Co., a Virginia Corporation, as to it and to all parties herein joined as parties-defendant is denied.

Oct. 15, 1970—Amended Order entered.

Dec. 3, 1970—Defendant, Albemarle Paper Co.'s (Delaware) Answer filed.

Dec. 3, 1970—Defendant, Hoerner Waldorf Corp.'s Answer filed.

Dec. 28, 1970—Defendant, Ethyl Corp.'s Answer and Cross-Claim filed.

Mar. 15, 1971—Defendant, Ethyl Corp.'s Notice of Dismissal of Cross-Claim filed.

May 28, 1971—Order entered requiring Plaintiffs to answer Supplemental Interrogatory no later than June 25, 1971.

June 15, 1971—Order entered defining class and directing Plaintiffs to answer Supplemental Interrogatory by July 10, 1971.

June 18, 1971—Order entered directing that all parties and their counsel are forbidden directly or indirectly to communicate concerning this action with any potential or actual class member not a formal party to action without consent and approval of proposed communication of the Court.

July 8, 1971—Order entered directing Notice to members of the class.

July 14, 1971—Plaintiffs' Motion for Leave of Counsel for Plaintiffs to Communicate with Class Members for Purposes of Trial Preparation filed.

July 14, 1971—Plaintiffs' Motion for Clarification filed.

July 14, 1971—Plaintiffs' Motion for Severance and the Appointment of a Master filed.

July 25, 1971—Trial commenced before the Hon. F. T. Dupree, Judge, United States District Court.

Nov. 11, 1971—Order and Memorandum Opinion entered enjoining Defendants from discriminating against Negro employees and setting out certain procedures to be followed.

Nov. 22, 1971—Plaintiffs' Motion to Alter or Amend the Judgment filed.

Dec. 7, 1971—Plaintiffs' Notice of Appeal filed.

Jan. 3, 1972—Order entered extending time for transmittal of record on appeal.

Mar. 13, 1972—Record on appeal filed and appeal docketed in the United States Court of Appeals for the Fourth Circuit.

May 3, 1972—Order entered allowing Equal Employment Opportunity Commission to participate as Amicus Curiae.

May 8, 1972—Order entered extending time to file appellee's brief and reply brief.

May 22, 1972—Appellant's Motion for Extension of Time to File Brief to May 29, 1972 filed and Motion granted.

Aug. 17, 1972—Appellant's Motion for Extension of Time to File Reply Brief to August 22, 1972, filed and Motion granted.

Oct. 3, 1972—Cause argued before Boreman, Bryan and Craven, Circuit Judges and submitted.

Feb. 20, 1973—Opinion of the United States Court of Appeals for the Fourth Circuit filed.

Feb. 20, 1973—Judgment of the District Court reversed. Judgment filed.

Mar. 6, 1973—Petition for Rehearing and Suggestion of a Rehearing En Banc, filed.

Mar. 6, 1973—Petition for Rehearing En Banc on Behalf of Appellee, Halifax Local 425, et al. filed.

June 25, 1973—Order Granting a Rehearing En Banc filed.

Aug. 31, 1973—Appellant's Supplemental Brief on Rehearing En Banc filed.

Aug. 31, 1973—Appellee Employer's Supplemental Brief filed.

Sept. 4, 1973—Amicus Curiae Brief for the United States and the Equal Employment Opportunity Commission filed.

Oct. 28, 1973—Cause argued En Banc before Haynsworth, Chief Judge, Boreman, and Bryan, Senior Circuit

Judges, Winter, Craven, Butzner, Russell, Field and Widener, Circuit Judges and submitted.

Dec. 5, 1973—Certificate mailed to Clerk of the United States Supreme Court.

Dec. 5, 1973—Held in abeyance pending decision of the Supreme Court of the United States on Court of Appeals' Certificate.

July 22, 1974—Order rescinding the Court of Appeals' Order of June 25, 1973 and denying the Petitions for Rehearing and Rehearing En Banc filed.

Aug. 9, 1974—Certified copy of Order of the Supreme Court regarding question to the Court answered in the negative.

Aug. 29, 1974—Motion of Halifax Local 425 for recall and stay of mandate filed.

Sept. 4, 1974—Appellee, Employers' Motion to Recall Issuance of Mandate filed.

Sept. 13, 1974—Order recalling and staying mandate, not to exceed thirty (30) days, pending application for certiorari, filed.

Oct. 7, 1974—Notice evidencing the filing of Petition for a Writ of Certiorari in the Supreme Court October 7, 1974 filed (No. 74-389).

Oct. 22, 1974—Certificate evidencing the docketing of the case in the Supreme Court October 15, 1974 filed (No. 74-428).

Dec. 23, 1974—Order Granting Certiorari December 16, 1974 in No. 74-389.

Dec. 23, 1974—Order Granting Certiorari December 16, 1974 in No. 74-428.

* * *

In The
UNITED STATES DISTRICT COURT
FOR THE
Eastern District Of North Carolina
Wilson Division

Civil Action No. 989

Joseph P. Moody, Theodore Daniels, Henry Hill and Arthur Mitchell,

Plaintiffs,

v.

Albemarle Paper Company; United Papermakers and Paperworkers, A.F.L.-C.I.O. and Halifax Local No. 425, United Papermakers and Paperworkers, A.F.L.-C.I.O.,

Defendants.

COMPLAINT
[Filed August 25, 1966]

I

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1343 and 42 U.S.C. § 2000e, this being a suit in equity authorized and instituted pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., providing for injunctive and other relief against racial discrimination in employment.

II

Plaintiffs bring this action on their own behalf and on behalf of others similarly situated pursuant to Rule 23(a)

and (b) of the Federal Rules of Civil Procedure. There are common questions of law and fact affecting the rights of others seeking equal employment opportunities without discrimination on the basis of race and color who are so numerous as to make it impracticable to bring them all individually before the Court; the claims and defenses of the plaintiffs are typical of the claims and defenses of the class; and the plaintiffs will fairly and adequately protect the interests of the class. The defendants have adopted rules and policies and have refused to eliminate same, which have deprived and will continue to deprive the plaintiffs and others of their class of their rights to equal employment opportunities without regard to their race or color as secured to them by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq.

III

This is a proceeding for a permanent injunction to restrain the defendants from maintaining any policy, practice, custom or usage of withholding, denying, attempting to withhold or deny, and depriving or attempting to deprive or otherwise interfering with or limiting the rights of plaintiffs and others of their class to equal employment opportunities at the Roanoke Rapids, North Carolina plant of defendant Albemarle Paper Company without discrimination on the ground of race or color.

IV

Plaintiffs Joseph P. Moody, Theodore Daniels, Henry Hill and Arthur Mitchell are Negro citizens of the United States and the State of North Carolina, residing in the County of Halifax, North Carolina. Plaintiffs are and have been employed at the Albemarle Paper Company plant at Roanoke Rapids, North Carolina, for several years.

V

A. Defendant Albemarle Paper Company is a corporation incorporated under the laws of the State of Virginia, and authorized as a junior corporation to do business in the State of North Carolina, with power to sue and be sued in its corporate name. Said defendant operates a paper plant in the City of Roanoke Rapids, North Carolina, processing wood and pulp into paper. Said defendant is an employer in an industry which affects interstate commerce and employs more than 100 employees.

B. Defendants United Papermakers and Paperworkers, A.F.L.-C.I.O. and its Halifax Local No. 425 (hereinafter referred to as "Union") are international and local labor organizations representing the employees of defendant Albemarle Paper Company in dealing and negotiating with said company concerning terms, conditions and privileges of employment. The Union is engaged in an industry which affects interstate commerce and has more than 100 members.

VI

A. Defendant Albemarle Paper Company has followed and presently follows a practice and policy of limiting and classifying its employees on the basis of race or color. Defendant company maintains segregated eating and rest rooms and medical facilities for its employees. All matters regarding compensation, terms, conditions and privileges of employment of plaintiffs and the class they represent have been governed by collective bargaining agreement entered into by defendants Albemarle Paper Company and the Union.

B. Defendants have entered into labor agreements to govern the terms, conditions, privileges, wages and benefits

of employees of the Albemarle Paper Company plant at Roanoke Rapids, North Carolina, which have included provisions for a seniority system designed to and having the effect of discriminating against plaintiffs and others of their class solely because of their race and color. The last such agreement was executed by defendants in August, 1965 and extends through August, 1968.

C. Defendants have limited the employment opportunities of plaintiffs and other Negro employees, and discriminated against plaintiffs and other Negro employees in the compensation, terms, conditions and privileges of employment because of race and color.

VII

Defendants' discrimination against plaintiffs and others of their class with respect to terms, conditions and privileges of employment and classification of plaintiffs and others of their class in employment were intended to deny and have had the effect of denying the plaintiffs and others of their class equal employment opportunities and to otherwise adversely affect their status as employees solely because of their race and color in violation of their rights secured to them by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

VIII

Neither the State of North Carolina nor the County of Halifax nor the City of Roanoke Rapids has a law prohibiting the unlawful practices alleged herein.

On or about May 9, 1966, the plaintiffs filed a complaint with the Equal Employment Opportunity Comission alleging denial by defendants of their rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. On or about August 1, 1966, the plaintiffs received

a letter from the Commission advising that their right to maintain civil actions for relief in the United States District Court.

IX

Plaintiffs have no plain, adequate or complete remedy at law to redress the wrongs alleged herein and this suit for a permanent injunction is their only means of securing adequate relief. Plaintiffs and the class they represent are now suffering and will continue to suffer irreparable injury from defendants' policy, practice, custom and usage as set forth herein unless and until enjoined by this Court.

Wherefore, plaintiffs respectfully pray this Court advance this cause on the docket, order a speedy hearing at the earliest practicable date; cause this case to be in every way expedited, and upon such hearing to:

1. Grant plaintiffs and the class they represent a permanent injunction enjoining defendants, Albemarle Paper Company and the Union, their agents, successors, employees, attorneys and those acting in concert and participation with them and at their direction from continuing or maintaining any policy, practice, custom or usage of denying, abridging, withholding, conditioning, limiting or otherwise interfering with the rights of the plaintiffs and others of their class to equal employment opportunities including equal rights to employment, equal terms, conditions and privileges of employment as secured by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq.

2. Allow plaintiffs their costs herein, including reasonable attorneys' fees and such other additional relief as may appear to the Court to be equitable and just.

Respectfully submitted,

/s/ J. LeVonne Chambers

In The

UNITED STATES DISTRICT COURT

FOR THE

Eastern District of North Carolina

Wilson Division

[Title Omitted in Printing]

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

[Filed November 22, 1966]

II

This Action May Properly Be Brought as a Class Action under Rule 23 of the Federal Rules of Civil Procedure.

Rule 23(a) and (b) (as amended effective July 1, 1966), set forth the requirements for bringing a class action. The basic requirements of Rule 23(a)—(1) sizeable class, (2) common questions of law or fact, (3) claims typical of class presented by plaintiffs and, (4) adequate representation of class by plaintiffs—all are duly alleged by plaintiffs and are obviously met. We do not understand defendant to challenge plaintiffs' credential regarding any of these requirements and they, therefore, stand as alleged. It may be noted that regarding requirement (2), defendant expressly concedes that "there are questions which relate to all mem-

bers of the class as well as questions which relate to the Plaintiffs."[23]

The special requirements set forth in Rule 23(b) are also by plaintiffs. Rule 23(b) sets forth three special situations, any one of which will justify a class action. Plaintiffs seek to maintain this class action under subdivision (b)(2) of Rule 23 which requires that

> "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

Plaintiffs' action does not merely fall under subdivision (b)(2). Rather plaintiffs' action is *the model* which (b)(2) was designed to include. The comment of the advisory committee which prepared the new Rule 23 makes this crystal clear.

> *"Subdivision (b)(2).* This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate. Declaratory relief 'corresponds' to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief. The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages. Action or inaction is directed to a class within the meaning of this subdivision even if it

[23] Defendant's Memorandum, p. 15.

has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.

Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration." Advisory Committee Note to amended Rule 23, 86 Sup. Ct. No. 11, Yellow Supp. at 34 (1966) (Emphasis added).

Plaintiffs so abundantly meet all of the requirements of Rule 23 that defendant could not seriously challenge plaintiffs' credentials under the Rule. To defendant's credit, it does not attempt to do so. As we understand defendant's position, it does not question whether plaintiffs meet the requirements of Rule 23, but rather suggests that class actions are prohibited by Title VII even to a party who qualifies under Rule 23. Defendant advances two points in support of this position:

(1) Plaintiffs should not be permitted to sue on behalf of other members of their class since the other members have not exhausted their remedies before the Commission.

(2) The scheme of Title VII is such that the Attorney General is vested with exclusive authority to bring class actions.

This memorandum will take up defendant's points in order.

1. Plaintiffs Have The Right To Sue For Other Class Members Who Have Not Exhausted Their Remedies.

It is important to understand the exact nature of the class relief being sought by plaintiffs. No money damages are sought for any member of the class not before the

court, nor is specific relief in the way of job changes, promotions or the like being sought for any member of the class not before the court. The only relief sought for the class as a whole is that defendants be enjoined from treating the class as a separate group and discriminating against the class as a whole in the future (Complaint, Para. IX).

The issue of discrimination against the class as a whole is the essence of this action and it was the essence of the complaints filed before the Commission. The proof involved in establishing this discrimination will necessarily include not only proof of plaintiffs' treatment but also proof of the treatment of all other Negroes employed by defendant. This common issue of class discrimination has been presented to the Commission as fully as it can be presented. There is no need for, and indeed no sense in, presenting this common issue to the Commission time and again when the Commission has once shown an inability to resolve it.

It may well be that any employee seeking separate and specific relief such as an individual promotion should first address his individual grievance to the Commission. But the matter of specific individual relief for other class members is not before this Court. The only class issue is the common one of enjoining general class discrimination in the future. With regard to this relief there are no specifically aggrieved individuals since no specific individual can be aggrieved by a possible future event. The grievance is a class grievance and it must be presented by representatives of the class if it is to be presented at all.

The point was well made by Judge Gray in *Hall* v. *Werthan Bag Corp.*, 251 F.Supp. 184 (M.D. Tenn. 1966). That case, like the instant case, involved a Title VII class action where a broad injunction against future discrimination was sought. In addition, specific relief for the named individual plaintiffs was sought. In ruling that a class ac-

tion on the common issue of class discrimination was proper, Judge Gray stated:

> "Racial discrimination is by definition a class discrimination. If it exists, it applies throughout the class. . . . [A]lthough the actual effects of a discriminatory policy may . . . vary throughout the class, the existence of the discriminatory policy threatens the entire class. And whether the Damoclean threat of a racially discriminatory policy hangs over the racial class is a question of fact common to all members of the class.
>
> * * *
>
> In regard to the injunctive relief sought in this case, . . . the purpose of the requirement of resort to the Commission has already been served. In regard to whatever back pay or reinstatement might be sought as ancillary relief, however, the purpose of the administrative remedies requirement has been satisfied only as to Robert Hall, for the Commission has not attempted conciliation in regard to rectifying any alleged injuries which other Negro employees or would-be employees may claim to have suffered as a result of the defendant's alleged discrimination.
>
> Upon consideration, therefore, the court is of the opinion that the complaint properly states a class action under Rule 23(a) insofar as it seeks a prohibitive injunction." 251 F.Supp. at 186, 188.

In the instant case, plaintiffs ask that this Court adhere to the sound distinction drawn by Judge Gray between the class injunctive relief and ancillary specific individual relief.

* * *

In The

UNITED STATES DISTRICT COURT

FOR THE

Eastern District of North Carolina

Wilson Division

C.A. No. 989

Joseph P. Moody, Theodore Daniels, Henry Hill, and Arthur Mitchell,

Plaintiffs,

v.

Albemarle Paper Company; United Papermakers and Paperworkers, A.F.L.-C.I.O. and Halifax Local No. 425, United Papermakers and Paperworkers, A.F.L.-C.IO.,

Defendants,

Equal Employment Opportunity Commission,

Intervenor.

MEMORANDUM OPINION and ORDER

[Filed July 6, 1967]

Plaintiffs bring this action on their own behalf and on behalf of other Negroes similarly situated under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., alleging violations by their employer, their local union, and

the defendant international union of their rights to equal employment opportunities. Jurisdiction in this Court is provided by the Act and by 28 U.S.C. § 1343.

Several motions have been filed by the defendants and are now before the Court for ruling. Within 20 days of service of the complaint, the local union moved to dismiss the action or in lieu thereof to quash the return of service of the summons upon the grounds that service had been improperly made and that the complaint fails to state a claim against the local union upon which relief may be granted. In a separate motion filed on the same date, and within 20 days of service upon it, the international union likewise moved to dismiss the action or in lieu thereof to quash the return of summons upon the grounds that service was improperly made and that the complaint fails to state a claim upon which relief against it may be granted. The employer, Albermarle Paper Company, has filed a Motion for Summary Judgment upon the following grounds: (1) that the Court lacks subject matter jurisdiction and that the complaint fails to state a claim upon which relief may be granted, for the reason that plaintiffs have not exhausted their administrative remedies before the Equal Employment Opportunity Commission as is required by Section 706(e) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e); (2) that the complaint fails to state a claim upon which relief may be granted in a class action. Oral argument was presented at a hearing requested by the parties, and numerous briefs and memorandums of law have been submitted in support of the parties' respective positions. The objections to the sufficiency of service of process upon the local union and the international union were withdrawn at the hearing, leaving for decision the jurisdictional questions and that of whether the complaint states a claim for relief as to each defendant.

The Court is of the opinion that only one of the motions, that of the international union, has merit. Jurisdictional prerequisites for institution of an action under Title VII of the Civil Rights Act of 1964 have been the subject of much recent litigation. See, *e.g., Hall* v. *Werthan Bag Corp.*, 251 F.Supp. 184 (M.D. Tenn. 1966); *Dent* v. *St. Louis-San Francisco Rwy Co.*, 265 F.Supp. 56 (N.D. Ala. 1967); *Robinson* v. *Lorillard*, Civil Action No. C-141-G-166 (M.D.N.C. 1967); *Quarles* v. *Phillip Morris, Inc.*, Civil Action No. 4544 (E.D. Va. 1967); *Evenson* v. *Northwest Airlines, Inc.*, Civil Action No. 3961, 35 U.S.L. Week 2601 (E.D. Va. 1967); *Anthony* v. *Brooks*, Civil Action No. 9947 (N.D. Ga. 1967); *Mickel* v. *South Carolina State Employment Service*, No. 11069 (4th Cir. May 3, 1967). From a reading of the foregoing cases, it appears that the better rules regarding jurisdictional prerequisites and the propriety of entertaining an action under Title VII are as follows:

1. *Subject Matter Jurisdiction.* After an aggrieved party has filed a written complaint with the Equal Employment Opportunity Commission and has received notice from the Commission that voluntary compliance within sixty days from receipt of the complaint by the Commission has not been effected, no further formal efforts toward conciliation by the Commission are necessary to open the district courts to a private civil action by the complainant against a respondent named in the charge theretofore filed with the Commission. To the extent that *Dent, supra*, is inconsistent with this ruling, it is disapproved and not followed.

2. *In Personam Jurisdiction.*

(a) *Parties Plaintiff:* All potential parties plaintiff in a class action seeking relief under the Act are not required

to have all joined in as a group or class in the prior written complaint to the Commission. This Court approves and adopts the rationale of *Hall, supra*, in this respect.

(b) *Parties Defendant:* Although, as indicated, all *plaintiffs* in a class action under the provisions of Title VII are not required individually to exhaust their administrative remedies before the Commssion where some members of the class have already done so, it is a quite different matter as to who may be made a party *defendant:* a plaintiff or a class of plaintiffs may institute a civil action in federal district court under Section 706(e) of the Act against only an employer, employment agency, or labor organization which was a respondent named in the charge filed with the Commission. Whether this be treated as a question of subject matter jurisdiction or personal jurisdiction, the requirement that all defendants be named in the charge filed with the Commission goes to the competence of a district court to entertain the action in respect to the party in question (international union), as defined in clear language of the statute. *Mickel* v. *South Carolina State Employment Service, supra.* The contention that the local union is the agent of the international union is without merit, the records indicating that the local is merely affiliated with the international and enjoys an autonomous existence. This is insufficient to establish responsibility of the international for any alleged unlawful conduct on the part of the local.

ORDER

It is therefore Ordered that the Motion to Dismiss filed by Halifax Local No. 425, United Papermakers and Paperworkers, A.F.L.-C.I.O. be, and the same is hereby denied;

It is Further Ordered that the Motion of United Papermakers and Paperworkers, A.F.L.-C.I.O. (International) to dismiss be, and the same is hereby allowed;

It is Further Ordered that the Motion for Summary Judgment filed by Albemarle Paper Company be, and the same is hereby denied.

It is Further Ordered that the Clerk shall serve copies of this Memorandum Opinion and Order upon all counsel of record.

Let this Order be entered forthwith.

/s/ John D. Larkins, Jr.
John D. Larkins, Jr.
United States District Judge

In The

UNITED STATES DISTRICT COURT

FOR THE

Eastern District of North Carolina

Wilson Division

(Civil Action No. 989)

[Title Omitted in Printing]

ANSWER

[Filed July 26, 1967]

Defendant, Albemarle Paper Company, for answer to the complaint served on it in this action, says:

1. Defendant admits the enactment of the Acts of Congress as alleged in paragraph 1 of the Complaint, but denies that they are applicable in the premises and, further answering, Defendant denies that it has deprived Plaintiffs of any rights secured them by any of the Acts whose existence is alleged in paragraph 1 of the Complaint, or otherwise.

2. Defendant denies the allegations of paragraph 2 of the Complaint.

3. Defendant denies the allegations of paragraph 3 of the Complaint.

4. Defendant admits the allegations of paragraph 4 of the Complaint.

5. Defendant admits the allegations of paragraph 5 of the Complaint.

6. Defendant denies the allegations of paragraph 6 of the Complaint.

7. Defendant denies the allegations of paragraph 7 of the Complaint.

8. Defendant admits that neither the State of North Carolina nor the County of Halifax nor the City of Roanoke Rapids have enacted laws or ordinances regulating unlawful employment practices. Defendant is without knowledge as to the remainder of the allegations of paragraph 8 of the Complaint and accordingly denies the same, except that Defendant admits that on or about August 11, 1966, it received copies of Complaints of "Unfair Employment Practices Under the 1964 Civil Rights Act Title 7," signed by the Plaintiffs and verified on February 20, 1966.

9. Defendant denies the allegations of paragraph 9 of the Complaint and denies that Plaintiffs are entitled to any of the relief prayed for, or any other relief.

Affirmative Defenses

First Defense:

The Complaint fails to state a claim against Defendant upon which relief may be granted.

Second Defense:

The Complaint is barred by the Statute of Limitations inasmuch as there is no allegation in the Complaint that the alleged conduct occurred within 90 days prior to the

filing of charges with the Equal Employment Opportunity Commission.

Third Defense:

The Complaint fails to state a claim upon which relief can be granted in a class action, in that the rights, if any, of the members of the alleged class are several and not joint and there is no common question of law or fact that is affecting the rights of the members of the alleged class, and no common relief can be granted in this action.

Fourth Defense:

The Court lacks jurisdiction over the subject matter of this action and the Complaint fails to state a claim upon which relief may be granted because the Plaintiffs have not exhausted their remedies before the Equal Employment Opportunity Commission as required by Section 706(e) of the Act, 42 U.S.C. § 2000e-5.

Fifth Defense:

The Complaint fails to state a claim upon which relief can be granted in a class action because the Plaintiffs have not notified the members of the class of their right to participate in, or be excluded from, this action as required by Rule 23 of the Federal Rules of Civil Procedure.

Sixth Defense:

The Complaint should be dismissed because the International Union, United Papermakers and Paperworkers, AFL-CIO, is an indispensable party to this action.

Wherefore, having fully answered, Defendant prays that this action be dismissed and that it be awarded its costs herein expended, including reasonable attorneys' fees.

Albemarle Paper Company,

By .....
Its Counsel

Francis V. Lowden, Jr.
Paul M. Thompson
Hunton, Williams, Gay, Powell & Gibson
700 East Main Street
Richmond, Virginia 23212

Allsbrook, Benton, Knott, Allsbrook & Cranford
P. O. Box 108
Kidd Building
Roanoke Rapids, North Carolina 27870
Of Counsel

[Certificate of Service Omitted in Printing]

In The

UNITED STATES DISTRICT COURT

FOR THE

Eastern District of North Carolina

Wilson Division

(Civil Action No. 989)

[Title Omitted in Printing]

ANSWER

[Filed July 28, 1967]

The defendant, Halifax Local No. 425, United Papermakers and Paperworkers, A.F.L.-C.I.O., one of the above named defendants answering the Complaint of the plaintiffs says:

1. Paragraph 1 of the plaintiffs' Complaint is admitted.

2. Paragraph 2 of the plaintiffs' Complaint is denied.

3. Answering paragraph 3 of the plaintiffs' Complaint, it is admitted that the nature of the relief sought by the plaintiffs is injunctive; however, this defendant has not committed any acts for which they should be subjected to the relief sought by the plaintiffs and, therefore, the remaining allegations of paragraph 3 are denied.

4. Paragraph 4 of the plaintiffs' Complaint is admitted.

5. Answering paragraph 5 of the plaintiffs' Complaint, this answering defendant admits the allegations of said paragraph as the same pertain to this answering defendant. Except as admitted, this defendant denies the remainder of the allegations of said paragraph.

6. The allegations of paragraph 6 of the plaintiffs' Complaint are denied.

7. The allegations of paragraph 7 of the plaintiffs' Compaint are denied.

8. This answering defendant does not have sufficient information as to the allegations in paragraph 8 of the plaintiffs' Complaint to form a reasonable belief as to the truth or falsity thereof, and, therefore, denies the same.

9. The allegations of paragraph 9 of the plaintiffs' Complaint are denied.

For A First Further Answer And Defense, This Answering Defendant Alleges:

1. Administrative remedies for persons alleging denial of rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq. are provided by said Act.

2. The plaintiffs herein have failed to exhaust the administrative remedies before the Equal Employment Opportunity Commission as provided by the Civil Rights Act of 1964, prior to the institution of this action, and such remedies are required to be exhausted prior to the institution of an action of the nature herein brought by the plaintiffs.

And For A Second Further Answer And Defense, This Answering Defendant Alleges:

The plaintiffs have failed to exhaust the conciliation remedies provided in the Civil Rights Act of 1964 through the Equal Employment Opportunity Commission.

And For A Third Further Answer And Defense, This Answering Defendant Alleges:

1. The Constitution of United Papermakers and Paperworkers, A.F.L.-C.I.O. and particularly Article IX, Section 9, Subsections a and b provides contractual remedies and procedures for employees who allege a denial of rights in connection with their employment.

2. The plaintiffs have failed to exhaust the remedies and procedures provided them under the terms of the collective bargaining agreement pertaining to their employment and remedies provided by the Constitution of United Papermakers and Paperworkers A.F.L.-C.I.O. and specifically those provisions of said Constitution contained in Article IX, Section 9, Subsections a and b.

Wherefore, the defendant, Halifax Local No. 425, United Papermakers and Paperworkers, A.F.L.-C.I.O., having fully answered the Complaint of the plaintiffs prays the Court that the plaintiffs' action be dismissed against this defendant, that the cost of this action be taxed against the plaintiffs, and for such other relief as may appear to be just and proper.

Respectfully submitted,

James B. Ledford
623 E. Trade Street
Charlotte, North Carolina 28202

Bonner D. Sawyer
Hillsboro, North Carolina

Warren Woods
1735 K Street, N.W.
Washington, D. C. 20006

Attorneys for Defendant
Halifax Local No. 425,
United Papermakers and Paperworkers,
A.F.L.-C.I.O.

[Certificate of Service Omitted in Printing]

In The

UNITED STATES DISTRICT COURT

FOR THE

Eastern District of North Carolina

Wilson Division

[Title Omitted In Printing]

LETTER OF JUNE 12, 1970

June 12, 1970

Moody v. Albemarle Paper Company,

Civil Action No. 989

Honorable John D. Larkins
United States District Judge
Eastern District of North Carolina
Trenton, North Carolina

Dear Judge Larkins:

Counsel for the parties in the above action met in Roanoke Rapids, North Carolina, on June 4, 1970, for the purpose of stipulating certain facts which would make unnecessary (1) the introduction of the voluminous personnel records copied by plaintiffs and (2) the answer to defendant's supplemental interrogatory.

At the outset of the meeting it developed that the plaintiffs would not agree not to introduce the documents aforesaid if the stipulation were worked out. Since all counsel were present we did spend the day working out some

stipulated facts, in preparation for pretrial conference, but the basic problem remains unsolved.

Therefore, the defendant, Albemarle Paper Company, requests the Court to require plaintiffs to answer the supplemental interrogatory.

As you know, the assets of Albemarle Paper Company were sold on October 31, 1968. We understand the plaintiffs will move the Court within the next ten days to make the new corporation a party. The new corporation desires an opportunity to be heard on this motion.

One of the reasons assigned by Counsel for plaintiffs for refusing to agree not to introduce the voluminous documents is that they now think they may have a claim for monetary damages. The Court will note that no such damages were sought in the complaint and have not been mentioned during the first three and one-half years this case has been pending. I mention this at this time in order that the record will show that the defendants take the position that damages are not an issue in this case unless the Court permits an amendment to the complaint, an action which defendants would strenuously oppose at this late date.

Sincerely yours,
Francis V. Lowden, Jr.

cc: Robert Belton, Esq.
Julian R. Allsbrook, Jr., Esq.
Warren W. Woods, Esq.

In The

UNITED STATES DISTRICT COURT

FOR THE

Eastern District Of North Carolina

Wilson Division

No. 989—Civil

Joseph P. Moody, et al.,

Plaintiffs,

v.

Albemarle Paper Company, et al.,

Defendants.

OPINION AND ORDER

[Filed September 29, 1970]

LARKINS, District Judge:

This cause is now before the court upon the several motions below-listed in a civil action instituted by the Plaintiffs upon the alleged deprivation of their rights to equal employment opportunities pursuant to the provisions of Title VII of the Civil Rights Act of 1964; 42, United States Code Annotated, Section 2000, *et seq.*, jurisdiction in the court being grounded in the "Act" and pursuant to the provisions of Title 28, United States Code Annotated, Section 1343.

The specific motions before the court for its determination presently are as follows:

(1) Plaintiffs' Motion to Add or Join the Albemarle Paper Company, the Hoerner Waldorf Corporation, the First Alpaco Corporation and the Ethyl Corporation as parties defendant pursuant to the provisions of Rules 19, 20 and 25(c), Federal Rules of Civil Procedures; and,

(2) Motion of Defendant Albemarle Paper Company, ("old" Albemarle), to Dismiss.

Issues have been joined by the parties Memoranda of Law in support and opposition to and of the motion to add or join parties and in support of the motion to dismiss, and opposition.

The court will first look to the merits of Plaintiffs' collective motions to add or join the parties above-named. Then a determination upon Defendant "old" Albemarle's Motion to Dismiss will be made.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action was originally instituted on August 25, 1966, with Albemarle Paper Company, a Virginia corporation, being named defendant in the original suit. Although at that time and until October 31, 1968, "old" Albemarle was a wholly owned subsidiary of Ethyl Corporation; neither Ethyl, Hoerner Waldorf, Alpaco, nor Albemarle Paper Company (a Delaware corporation—hereinafter referred to as "new" Albemarle) were named as parties defendant. Of course "new" Albemarle had not been formed at that time.

On October 31, 1968, pursuant to an agreement dated October 25, 1968, between Ethyl Corporation, Albemarle

Paper Company, Interstate Bag Company, Inc., a Virginia corporation, and Hoerner Waldorf Corporation, a Delaware corporation, "old" Albemarle transferred all of its property and assets, real, personal, tangible and intangible located in Roanoke Rapids, North Carolina, to Albemarle Paper Company, a Delaware corporation, i.e., "new" Albemarle. This was done by deed, bill of sale and related documents. On that same date, "old" Albemarle, by amendment to its charter, changed its name to First Alpaco Corporation. And Hoerner Waldorf paid to the account of First Alpaco Corporation a specified amount of money for the assets of "old" Albemarle, including those at Roanoke Rapids, North Carolina.

Since October 31, 1968, "old" Albemarle has had no control over any property or person working at its former mill in Roanoke Rapids, North Carolina. At no time did First Alpaco Corporation ever own any property or control any person working at the former mill of "old" Albemarle. On February 20, 1969, First Alpaco Corporation was merged into Ethyl Corporation. (Affidavit of Frederick P. Waren, Secretary of Ethyl Corporation).

"New" Albemarle, being the nominee of Hoerner Waldorf pursuant to the original agreement of October 25, 1968, presently has all management and control over the Roanoke Rapids facility in question—that being the situs of the alleged deprivation of Plaintiffs' rights.

In response to the plaintiffs' motions to add or join parties, the corporations therein named have relied primarily on this court's earlier ruling in this same case reported in 271 F. Supp. 27 (E.D.N.C., 1967). There this court, in allowing the motion of the international union to dismiss, held that where the international union was not named by plaintiffs in their complaint filed with the equal employment opportunity commission charging the denial of rights

to equal employment opportunities, the plaintiffs were not entitled to join the international union as a party defendant in a class action brought under the Civil Rights Act of 1964. This court said then that "the requirement that all defendants be named in the charge filed with the Commission goes to the competence of a district court to entertain the action. . . ."

But the decision there is distinguishable from the issue now directly in litigation. That determination establishing that the international must have been named in the charges before the E.E.O.C., was based on the fact that the local union (said union having been named before the E.E.O.C.) was autonomous in nature and was not an agent of the international union so as to permit the international union to be joined by plaintiffs as a party defendant. The court stated:

> "The contention that the local union is the agent of the international union is without merit, the records indicating that the local is merely affiliated with the international and enjoys an autonomous existence. This is insufficient to establish responsibility of the international for any alleged unlawful conduct on the part of the local." *Moody* v. *Albemarle,* 271 F. Supp. 27, 29 (E.D.N.C., 1967).

In other words, the international union was not, to any extent, viewed by the court as being the successor in interest to the local union—the local being a separate entity unto itself.

Further, a distinction between the issue there and that herein presented lies in the fact that at no time between the filing of charges by the plaintiffs before the E.E.O.C. and institution of the suit in this court had the stance or posture

of the international union changed. While, as per the corporations herein sought to be joined, two of these companies, First Alpaco Corporation and Albemarle Paper Company, a Delaware corporation, were not in existence at the time of filing of charges with the E.E.O.C. or institution of the suit in district court. Neither did Hoerner Waldorf Corporation have any interest in the charges or the suit. Now, Hoerner Waldorf, as the parent Corporation of "New" Albemarle surely would have an interest in protecting its "nominee" and wholly owned subsidiary from liability.

Only Ethyl Corporation, though it has engaged in some corporate shuffling involving liquidation of assets, stands now in substantially the same position as parent of Alpaco Corporation, as it did at the time of the filing of charges before the E.E.O.C. as the parent of "Old" Albemarle Paper Company.

However, even that stance is questionable in its similarity to the position of Ethyl Corporation at the time of the filing of charges before the E.E.O.C., because of the fact that on February 20, 1969, First Alpaco Corporation was merged into Ethyl Corporation.

The fact situation before the United States Court of Appeals for the Fourth Circuit in *Mickel* v. *South Carolina Employment Service*, 377 F.2d 239, (4th circ., 1967), was startlingly similar to those present in the earlier *Moody* ruling in that (1) there was a potential party-defendant in existence at the time of filing of charges before the E.E.O.C. which was not joined and (2) that party was not considered by the court to have been an agent of any party named in those charges before the E.E.O.C. In both instances the court determined that requisite jurisdiction had not been satisfied.

There is no doubt that conciliation is a jurisdictional prerequisite to institution of a civil action under the Civil

Rights Act of 1964 dealing with equal employment opportunities, and further that an action so instituted without complying with such jurisdictional prerequisite must be dismissed. Civil Rights Act of 1964 § 706(a,d,e), Title 42 U.S.C.A., § 2000e-5(a,d,e). *Mickel* v. *South Carolina Emp. Serv.*, supra.

However, the court is of the considered opinion that when an aggrieved party has brought charges against a named respondent before the E.E.O.C., thusly complying with jurisdictional prerequisites, and has instituted suit in the district court against that same party, he should be allowed to pursue his alleged claims for relief against the party defendant even though his course of pursuit may lead him through that dark and dismal forest known to all as the corporate reshuffle. And the court is impressed with the argument of counsel for the plaintiffs that if the decisions of *Mickel* and *Moody I* are considered by the court to be applicable to the facts at bar then "all employers charged before EEOC with violations of Title VII could easily escape liability by transferring its interest subsequent to filing of a Title VII suit in Federal Court." The court further agrees that, "If the court were then to find that the original employer-defendant had been or is presently guilty of a violation of the Title VII, an aggrieved party would have an empty victory because injunctive relief would not be appropriate and the original defendant would not be able to respond in damages because its assets had been transferred."

". . . Moreover, to require plaintiffs on the facts in this case to now go before EEOC as to these proposed defendants would subject plaintiffs to a possible never ending treadmill."

The court sees as one of its duties, the avoidance of a multiplicity of suits. And the court finds that clearly it was

not the intent of Congress, in passing Title VII of the Civil Rights Act of 1964, to create multiplicity or loophole.

Rule 25(c), Federal Rules of Civil Procedure provides in part as follows:

> "In case of any transfer of interest the action may be continued by or against the original party unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party."

The motion for joinder of parties having been made, and it appearing to the court that any or all of the parties sought to be added or joined have or could have the burden of liability in the event of a determination of liability being made, the court finds that Albemarle Paper Company, a Delaware corporation, the First Alpaco Corporation, Ethyl Corporation and Hoerner Waldorf Corporation should be joined as parties-defendant and the motion of plaintiffs should be allowed.

It was the intent of Congress, as evidenced by Section 706 (a,d,e) of Title VII, the Civil Rights Act of 1964, clearly, that all possible parties-defendant in Federal court be included as respondents to charges filed with the E.E.O.C. The obvious purpose therein was to subject all original claims to the possibility of conciliation at the administrative level before entrance into suit in the district court. This purpose is effectuated by the requirement that administrative remedies be exhausted by plaintiffs as to all defendants which were available to them at the time of filing of charges with E.E.O.C.

But the purpose of prior conciliation is not enhanced by requiring that plaintiffs exhaust administrative remedies as to new potential parties-defendant where those parties

are either substituted for original parties as successors in interest or are newly formed (at a time subsequent to the filing of charges with the E.E.O.C.). Rule 25(c) was specifically created to resolve this situation. Using the rule does not expand any federal jurisdiction, but only makes right what has the odorous property of being an unfair procedural obstacle.

No longer must we contend with the procedural traps of the Common Law, for we live in an enlightened age of the Federal Rules. And until finer tools are created, this court will utilize these Rules as they were intended to so be used.

Defendant "old" Albemarle Paper Company has moved the court to dismiss the case both as to it, the present defendant, and as to all those whom the plaintiffs have sought to join as Defendants essentially on the following grounds:

> That it, the Defendant "old" Albemarle is no longer in existence, all its interests in the plant and facility in Roanoke Rapids, North Carolina having been transferred out to other named parties in the motion to add or join, and no money damages specifically having been prayed for by plaintiffs, then the injunctive relief sought by plaintiffs not being possible as against a non-existent defendant, the whole matter should be dropped.

Defendant "old" Albemarle further asserts several reasons why the action should be dismissed which involve the merits of the dispute here in question, and of course, as we are not yet to the merits of this litigation, much to the chagrin of the court, these contentions can not be considered upon the motion to dismiss.

Rule 54(c) of the Federal Rules of Civil Procedure provides in part: "except as to a party against whom a judg-

ment is entered by default every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." The possibility of an award of money damages upon a determination of liability is still with us. It is not yet the proper time to drop the plaintiffs' claims, which are, at least, litigable.

However, in view of the fact that "old" Albemarle is no longer in existence, the court having found that all the interests originally held by it have been transferred out to the parties named in the motion to add or join; and further in view of the fact that usage of the terms "old" and "new" Albemarle is becoming tiresome, and Rule 25(c) providing that in the case of any transfer of interest the court may direct that the person or persons to whom the interests were transferred be substituted in the action for the original party, the court is wont to allow the motion to dismiss as to "old" Albemarle. But, in the interest of justice in the case at bar, the court finds that the more proper step to be taken is to keep the original party defendant in the litigation, even though it has now been dissolved, and allow the motion to add or join parties as to all those parties sought to be joined.

The court having considered the excellent Brief Amicus Curiae of the Equal Employment Opportunity Commission filed in support of plaintiffs' position with respect to their motion along with responsive briefs thereto, the court finds that the "Public Policy" sought to be served by Title VII is best served by taking the abovestated action.

Order

Now Therefore, in accordance with the foregoing, it is Ordered, that the Motion to Add or Join the Albemarle Paper Company, a Delaware corporation, the Hoerner Wal-

dorf Corporation, the First Alpaco Corporation, and the Ethyl Corporation be and the same is hereby Allowed, and,

Further Ordered, that the Motion to Dismiss on the part of Defendant Albemarle Paper Company, a Virginia corporation, as to it and all parties herein joined as parties-defendant, be and the same is hereby, Denied; and,

Further Ordered, that the Clerk shall serve copies of this Opinion and Order upon all Counsel of Record.

Let this Order be entered forthwith.

/s/ John D. Larkins, Jr.
John D. Larkins, Jr.
United States District Judge

Trenton, North Carolina
September 28, 1970

In The
UNITED STATES DISTRICT COURT
FOR THE
Eastern District of North Carolina
Wilson Division

[Title Omitted In Printing]

AMENDED ORDER

[Filed October 15, 1970]

Larkins, District Judge:

It Appearing To The Court, that certain wording in the Opinion and Order in this matter of the court dated September 28, 1970, may be or is ambiguous or misleading;

Now Therefore, It Is Ordered, that Line 17, Paragraph 3 of Page 5 of the Opinion and Order, which has heretofore read:

"There is no doubt that conciliation is a jurisdic- . . ."

be amended to read:

"There is no doubt that submitting to the possibility of conciliation is a jurisdic-";

and,

Further Ordered, that the Clerk shall serve copies of this Order upon All Counsel of Record.

Let this Order be entered forthwith.

/s/ John D. Larkins, Jr.
John D. Larkins, Jr.
United States District Judge

Trenton, North Carolina
October 14, 1970

In The

UNITED STATES DISTRICT COURT

FOR THE

Eastern District of North Carolina

Wilson Division

(Civil Action No. 989)

[Title Omitted In Printing]

ANSWER AND CROSS CLAIM OF ETHYL CORPORATION

[Filed December 28, 1970]

[Answer Omitted In Printing]

Cross-Claim Against Defendant, Hoerner Waldorf Corporation And Albemarle Paper Company, (Delaware)

1. Prior to July 2, 1965, and until October 31, 1968, the Albemarle Paper Company, a Virginia corporation, was a wholly owned subsidiary of Defendant, Ethyl Corporation.

2. By agreement dated October 25, 1968, between Defendant Ethyl Corporation, Defendant Hoerner-Waldorf Corporation, and others, certain assets of Albemarle Paper Company, a Virginia corporation, including the mill at Roanoke Rapids, North Carolina, were transferred to the nominee of Defendant Hoerner-Waldorf Corporation. This agreement provided in pertinent part that Defendant Hoerner-Waldorf Corporation would assume and pay "all liabilities of Albemarle and Interstate resulting from their respective operations in the ordinary course of their business prior to the closing date." (Section 1.03(b)). This agreement further provided that Defendant Hoerner-Wal-

dorf Corporation would indemnify and hold harmless Defendant Ethyl Corporation "from and against any claim or expense from or in connection with liabilities or obligations assumed by Hoerner-Waldorf under Section 1.03 . . . and all guarantees or contingent liabilities or obligations of Sellers with regard to the foregoing." (Section 1.05). In Exhibit I to the agreement of October 25, 1968, Defendant Ethyl Corporation expressly disclosed to Defendant Hoerner-Waldorf Corporation the existence of this lawsuit. Pursuant to this agreement, Hoerner-Waldorf Corporation, a Delaware corporation, delivered at the closing of the sale and purchase of assets a General Assumption of Obligations and Liabilities dated October 31, 1968, by which liabilities and obligations of Albemarle Paper Company, a Virginia corporation, were expressly assumed and Ethyl Corporation and Albemarle Paper Company, a Virginia corporation, were indemnified against any future claim or expense arising from the liabilities and obligations so assumed.

3. On September 29, 1970, the Court added the Ethyl Corporation as a Defendant in this action. Defendant Ethyl Corporation has requested the Defendant Hoerner-Waldorf Corporation to defend this action on behalf of Defendant Ethyl Corporation and to hold it harmless against any claim, expense, judgment or liability of or against Defendant Ethyl Corporation or Albemarle Paper Company, a Virginia corporation, arising out of this action or the defense thereof.

4. Defendants Hoerner-Waldorf Corporation and Albemarle Paper Company, a Deleware corporation, have refused the request of Defendant Ethyl Corporation and by so doing Defendants Hoerner-Waldorf Corporation and Albemarle Paper Company, a Delaware corporation, have

breached the express terms of the agreements previously mentioned herein.

Wherefore, the Defendant Ethyl Corporation demands judgment against the Defendant Hoerner-Waldorf Corporation and/or Albemarle Paper Company, a Delaware corporation, for any sum which may be recovered herein by the Plaintiffs against this Defendant and/or its costs and reasonable attorneys' fees.

Ethyl Corporation

By .....
Its Counsel

Charles F. Blanchard, Esq.
Yarborough, Blanchard, Tucker & Yarborough
Wachovia Bank Building
Raleigh, North Carolina 27602

Counsel for Defendant,
Ethyl Corporation

Dated: December 28, 1970

[Certificate of Service Omitted in Printing]

In The
UNITED STATES DISTRICT COURT
FOR THE
Eastern District Of North Carolina
Wilson Division

[Title Omitted In Printing]

ORDER

[Filed May 28, 1971]

This cause was heard by the undersigned on May 17, 1971, on the motion of defendant Albemarle Paper Company to compel responsive answers to its supplemental interrogatory as follows:

> "List the specific names of each employee or former employee whose personnel record or records in any way establishes or tends to establish any discrimination by Albemarle Paper Company in its employment practices and explain how such record or records show discrimination giving the specific dates and instances."

The Court has considered the pleadings and memoranda and heard arguments of counsel for all parties and is of the opinion that defendant's motion to compel responsive answers to the supplemental interrogatory should be granted.

It Is Therefore, Ordered, Adjudged And Decreed:

That the Plaintiffs answer the supplemental interrogatory in a responsive, complete and specific manner no later than June 25, 1971. The Clerk will mail conformed copies of this order to all interested counsel.

This 28th day of May, 1971.

/s/ F. T. Dupree, Jr.
Judge, United States District Court

In The

UNITED STATES DISTRICT COURT

FOR THE

Eastern District of North Carolina

Wilson Division

[Title Omitted In Printing]

(Civil Action No. 989)

ORDER

[Filed June 15, 1971]

At a hearing held on May 17, 1971, the motion of the defendant, Albemarle Paper Company, that plaintiffs be required to answer a supplemental interrogatory served on plaintiffs on April 24, 1969, was allowed, and at the request of the court counsel for said defendant submitted an order directing plaintiffs to answer the interrogatory which order was signed and entered herein under date of May 28, 1971. Thereafter a communication was received from counsel for plaintiffs objecting to the form of this order, and the court thereupon ordered further hearing on the matter to be held on June 10, 1971.

At this second hearing which was attended by all interested counsel motion of Albemarle Paper Company to compel answers to its supplemental interrogatory was reconsidered, and also considered were the matters of defining the class in this class action; the question of whether or not damages will be recoverable; and the matter of notice to be

given to the members of the class. The court thereupon made the following rulings and it is

ORDERED:

1. Plaintiffs are directed to answer the supplemental interrogatory of Albemarle Paper Company in a responsive and complete manner, and more specifically plaintiffs are directed to indicate in their answers where the records presently in possession of plaintiffs show that each member of the class represented by plaintiffs, who is claiming damages of the defendants by reason of the alleged racially discriminatory employment practices of the defendants was denied because of race the opportunity to fill a vacancy in a job for which the member was qualified on and after July 2, 1965; a statement as to each such member of the class as to how he was personally and specifically discriminated against; and the amount of damages being claimed.

2. The time in which plaintiffs may answer the supplemental interrogatory is extended to and including July 10, 1971.

3. Final ruling as to whether any member of the class may recover damages in this action is reserved.

4. The court designates the class which plaintiffs represent as follows:

(a) All Negroes employed at the Roanoke Rapids plant of Albemarle Paper Company as of June 30, 1967.

(b) All Negroes employed at said plant after June 30, 1967, except those whose initial permanent positions were not job classifications limited to or predominantly staffed by Negroes.

(c) All Negroes who may hereafter apply for or be employed at said Roanoke Rapids plant who may be affected by the alleged racially discriminatory employment practices of the defendants.

5. Counsel are directed to submit suggested forms of notice to be directed to the members of the class under the provisions of Rule 23(c)(2) on or before June 25, 1971.

6. The trial date for the action, July 26, 1971, at 10 o'clock a.m. in Courtroom No. 1, Federal Building, Raleigh, North Carolina, remains unchanged.

7. Except as herein modified the order of May 28, 1971, remains in full force and effect, and the directives and provisions of the court's memorandum of the conference on May 17, 1971, are by this reference incorporated herein.

This June 15, 1971.

/s/ F. T. Dupree, Jr.
United States District Judge

In The

UNITED STATES DISTRICT COURT

FOR THE

Eastern District of North Carolina

Wilson Division

[Title Omitted In Printing]

(Civil Action No. 989)

ORDER

[Filed June 18, 1971]

In this case, as in all class actions, there exists the potential of abuse of the procedure, intentional and inadvertent, unless procedures are devised and employed to anticipate abuse. The judges of this court have under consideration an amendment to the local rules to guard against the potential abuses of the class action processes. Meanwhile, in order to avoid misunderstanding, the court on its own motion makes the following ruling with respect to the future conduct of counsel in this case, and it is

ORDERED:

All parties hereto and their counsel are forbidden directly or indirectly, orally or in writing, to communicate concerning this action with any potential or actual class member not a formal party to the action without the consent and approval of the proposed communication by order of this court. Any such proposed communication shall be presented

to this court in writing with a designation of or description of all addressees and with a motion and proposed order for prior approval by this court of the proposed communication. The communications forbidden include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out of the action under subparagraph (b)(3) of Rule 23; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of this class action, and of any actual or potential orders herein which may create impressions tending, without cause, to reflect adversely on any party, the counsel, the courts, or the administration of justice. The obligations and prohibitions of this order are not exclusive, and all other ethical, legal and equitable obligations remain unaffected by the order. Neither does the order forbid communications between any attorney and his client, or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney.

This June 18, 1971.

/s/ F. T. Dupree, Jr.
United States District Judge

In The

UNITED STATES DISTRICT COURT

FOR THE

Eastern District of North Carolina

Wilson Division

[Title Omitted In Printing]

(Civil Action No. 989)

ORDER

[Filed July 8, 1971]

Upon Consideration of the suggested forms of notice submitted to the court by counsel pursuant to the order of June 15, 1971, and other matters presently requiring the court's attention, it is now

ORDERED:

1. Notice

(a) The notice to be given to the class affected by this action shall be in the form attached hereto and marked Exhibit A.

(b) A copy of the notice shall be mailed by first class mail in the official envelopes of the Clerk of this court to each Negro employed at the Roanoke Rapids plant of Albemarle Paper Company as of June 30, 1967, and to all Negroes employed at said plant after that date except those whose initial permanent positions were not job classifications limited to or predominantly staffed by Negroes.

(c) The notice shall be published in the Daily Herald, a newspaper published in Roanoke Rapids, North Carolina, in its editions of July 8, July 12, July 15 and July 19, 1971.

(d) Albemarle Paper Company shall post a copy of the notice on each of its bulletin boards in its Roanoke Rapids plant and keep the same posted for thirty days from the date of this order.

(e) The cost of mailing and publishing the notices shall be paid by the plaintiffs but shall be taxable as costs against the losing party in the case.

(f) Notwithstanding the provisions of the notice requiring filing of proofs of claim by July 22, 1971, the court will on or before August 6, 1971, entertain a motion by any interested member of the class for an extension of time in which to file claim upon a showing that the failure to file the claim timely was due to circumstances beyond the class member's control.

2. Damages

(a) In view of the ruling of the Court of Appeals for the Fourth Circuit in the case of *Robinson* v. *Lorillard Corporation*, No. 15,098, and related cases decided July 1, 1971, this court now rules that damages may be recovered in this action if the plaintiffs prevail.

(b) It is hoped that the damage claims, if found to be allowable, may be heard and determined at the trial, but if such claims become too numerous or complicated, this phase of the case may be referred to a special master.

3. Attorney's Fees

(a) In the event plaintiffs prevail, it would appear from the *Robinson* case cited above that notwithstanding the language of 42 U.S.C. § 2000e-5(k), plaintiffs will be en-

titled to counsel fees as a matter of right absent a showing of such special circumstances as would render an award of counsel fees unjust. Counsel are directed to brief this question and be prepared to argue the same at the time of the trial.

(b) In the event attorney's fees are claimed, counsel for plaintiffs are directed to file with the court at the time of the trial upon the court's request the details of any fee arrangement which they have with plaintiffs or anyone acting on their behalf, an itemized statement of their time and expenses incurred and the amount, if any, received on account to date and the source of same.

4. Stipulations

(a) Counsel are directed to file with the court on or before July 16, 1971, the stipulation of facts and a pretrial order incorporating all matters referred to in paragraph 7 of the court's memorandum of the conference of May 17, 1971.

5. Trial Briefs

(a) Counsel are directed to file with the court trial briefs covering all anticipated questions of substantive, procedural and evidence law on or before July 16, 1971.

This July 6, 1971.

/s/ F. T. Dupree, Jr.
United States District Judge

In The

UNITED STATES DISTRICT COURT

FOR THE

Eastern District of North Carolina

Wilson Division

[Title Omitted in Printing]

(Civil Action No. 989)

NOTICE OF PENDENCY OF CLASS ACTION

[Filed July 8, 1971]

(Exhibit A to Order of July 8, 1971)

To: All Black Employees Of Albemarle Paper Company At Its Roanoke Rapids Plant In Roanoke Rapids, North Carolina, And All Members Of The Class As Herein Defined:

Notice Is Hereby Given That:

On August 25, 1966, a civil action was filed in the United States District Court for the Eastern District of North Carolina by Joseph P. Moody, Theodore Daniels, Henry Hill and Arthur Mitchell as plaintiffs seeking relief under Title VII of the Civil Rights Act of 1964. This law prohibits discrimination in employment on the ground of race, color, religion, sex or national origin. The defendants in the case are Albemarle Paper Company, a Virginia corporation, Albemarle Paper Company, a Delaware corporation,

Ethyl Corporation, Hoerner-Waldorf and Halifax Local No. 425, United Papermakers and Paperworkers, AFL-CIO.

On June 15, 1971, the court entered an order allowing the action to be prosecuted as a class action under Rule 23 of the Federal Rules of Civil Procedure, and the class was defined as (1) all Negroes employed at the Roanoke Rapids plant of Albemarle Paper Company as of June 30, 1967; (2) all Negroes employed at said plant after June 30, 1967, except those whose initial permanent positions were not job classifications limited to or predominantly staffed by Negroes; and (3) all Negroes who may hereafter apply for or be employed at said Roanoke Rapids plant who may be affected by the alleged racially discriminatory employment practices of the defendants.

Plaintiffs' complaint seeks relief from alleged racially discriminatory practices and policies against black employees and potential black employees who are, have been or may be employed at the Roanoke Rapids plant of Albemarle Paper Company; relief in the form of back pay for any black employees who may be found to have been discriminated against because of race since July 2, 1965; an injunction against the use of or reliance on any tests and/or educational requirements not shown to be lawful in determining qualifications for the employment and promotions of black employees at the Roanoke Rapids plant; and to have the court require the institution of a plant seniority system for filling job vacancies.

The defendants have denied the material allegations of plaintiffs' complaint and deny all liability.

This notice in no way indicates any view of the court as to the merits of the action but is merely to advise you of the pendency of the suit and of your rights under it.

The case is set for trial in Courtroom No. 1, United States Courthouse, 310 New Bern Avenue, Raleigh, North Carolina, beginning at 10 o'clock a.m., July 26, 1971.

Your rights may be affected by this action, and if you believe that you have been discriminated against by any of the defendants in employment opportunities at Albemarle Paper Company on account of race and have a lawful claim against any defendant by reason thereof:

(a) the court will exclude you from the class represented by the attorneys for the plaintiffs if you request exclusion in writing addressed to the Clerk of the United States District Court, Eastern District of North Carolina, P. O. Box 25670, Raleigh, North Carolina, 27611, and postmarked not later than July 22, 1971. If you elect to be excluded from the class, you will be free to pursue on your own behalf whatever legal rights you may have.

(b) if you do not request exclusion from the class by July 22, 1971, you will be included in such class and any judgment, whether favorable or not, including any judgment approving any settlement of this action, will be binding upon you.

(c) if you do not request exclusion from the class but prefer in connection with your individual claim to be represented by your own attorney rather than by the attorneys for the plaintiffs herein, you may enter an appearance through your attorney but not later than July 22, 1971.

(d) in the event you are claiming damages of any of the defendants by reason of any alleged racially discriminatory practice, you must file your written proof of claim under oath with the Clerk of the U. S. Dis-

trict Court at the address shown herein stating the details of such alleged discrimination and the amount of damages you are claiming. Such claim must be mailed not later than July 22, 1971, or it will be forever barred.

If you have any questions concerning this notice, you may write or call the Office of the Clerk of the United States District Court, P. O. Box 25670, Raleigh, North Carolina, 27611, Telephone No. (919) 755-4370.

This July 6, 1971.

/s/ F. T. Dupree, Jr.
United States District Judge

In The

UNITED STATES DISTRICT COURT

FOR THE

Eastern District of North Carolina

Wilson Division

[Title Omitted in Printing]

(Civil Action No. 989)

MOTION FOR LEAVE OF COUNSEL FOR PLAINTIFFS TO COMMUNICATE WITH CLASS MEMBERS FOR PURPOSES OF TRIAL PREPARATION

[Filed July 14, 1971]

Plaintiffs move the Court, pursuant to its order entered on June 18, 1971, for entry of an order granting counsel for plaintiffs leave to contact, communicate, and discuss with actual and potential members of the class, for the purpose of adequately preparing plaintiffs' case for trial. Communication with actual and potential class members is necessary to enable counsel for plaintiffs to discuss with class members the nature of their testimony at trial; to obtain and review testimony which may be helpful in preparing plaintiffs' rebuttal testimony; to explain and discuss on a continuing basis the status of the proceedings; to assist counsel for plaintiffs in reviewing evidence which may be helpful in the cross-examination of the defendants' witnesses; and to discuss back pay claims.

As grounds for this motion, plaintiffs show the Court as follows:

1. On August 25, 1966, the complaint was filed in the instant case under Title VII of the Civil Rights Act of 1964 and the plaintiffs designated the action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

2. The then defendants challenged the right of plaintiffs to prosecute this action as a class action. After several hearings in the matter, the Court in its July 6, 1967 Memorandum, Opinion and Order allowed the class action.

3. On or about September 24, 1968 plaintiffs, pursuant to the September 18, 1968 Order of the Court, submitted their statement of the designation of class.

4. Since the institution of this action, counsel for the plaintiffs have met periodically with the named plaintiffs in this case as well as other black employees of Albemarle Paper Company. These meetings have taken place in the office of counsel for the plaintiffs, in Raleigh, North Carolina and in Roanoke Rapids, North Carolina. The purpose of these meetings has been to advise plaintiffs and other black employees of Albemarle Paper Company of the progress and status of the case and to obtain information which might be useful in the presentation of their claims. No attempt was made by counsel to record the names and addresses of all the black employees who attended the various meetings. Plaintiffs will show to the Court that in addition to the named plaintiffs and those persons listed below, Herman Johnson, Carlton Belfield, John Jarrell, Jake Alston, Joe Bradley, Joe Rook, Mack Johnson and Marvin Harrison have attended meetings on occasion.

5. In addition to the named plaintiffs, the following employees or former employees have formally retained counsel for the plaintiffs to represent them in this matter: Arthur

T. Kearney, Route 1, Box 127, Roanoke Rapids, North Carolina; Eulis K. Lawson, 124 Matthews, Roanoke Rapids, North Carolina; William Townes, Route 2, Box 216, Roanoke Rapids, North Carolina; James Mallory, 109 Prospect Street, Weldon, North Carolina; Frank Mayo, Route 2, Box 381-M, Roanoke Rapids, North Carolina; W. H. Mason, Street Route, Box 87B, Roanoke Rapids, North Carolina; E. R. Hardy, 334 E. Littleton Road, Roanoke Rapids, North Carolina; Philmore Taylor, 1940-A Carter Street, Roanoke Rapids, North Carolina; Lonnie Lee, Box 132, Gaston, North Carolina; Julius Love, Valentine, Virginia; Moses Vincent, Garysburg, North Carolina; M. C. Boone, Post Office Box 38, Garysburg, North Carolina; James Alfred Jones, 118 Lincoln Avenue, Roanoke Rapids, North Carolina; Ernest Garner, 1929 Glover Street, Roanoke Rapids, North Carolina; Ernest Hawkins, 1901 Glover Street, Roanoke Rapids, North Carolina; Johnnie E. Roberts, Post Office Box 453, Gaston, North Carolina; Clarence High, Route 2, Box 381J, Roanoke Rapids, North Carolina; Julian Peebles, Route 2, Box 279, Halifax, North Carolina; Marvin Harrison, 154 Carver Street, Roanoke Rapids, North Carolina; Charlie D. King, Star Route, Box 145, Emporia, Virginia; Eugene Neville, 130 Lincoln Avenue, Roanoke Rapids, North Carolina; Willie Ashe, Route 2, Box 278, Littleton, North Carolina; W. M. Martin, Route 1, Box 431, Roanoke Rapids, North Carolina; Perry M. Cowan, 524 First Street, Weldon, North Carolina; William Garris, Route 1, Box 249 Roanoke Rapids, North Carolina; Jesse Mallory, Garysburg, North Carolina; Alphonso Owens, Roanoke Rapids, North Carolina; William T. Vassor, Garysburg, North Carolina; A. N. Johnson, Route 1, Box 213, Jackson, North Carolina.

6. Counsel for the plaintiffs have assumed that since the initiation of this action they have represented other black employees of Albemarle Paper Company in addition to the named plaintiffs and this is particularly true since the order of the Court of August 6, 1967. Furthermore, it is apparent that many of the black employees of Albemarle Paper Company have relied on the representation of counsel for the plaintiffs to protect their interest in this action because from time to time counsel for the plaintiffs have received communications from black employees of Albemarle other than the named plaintiffs to discuss the status of the case and/or to request advice from counsel on what action should or should not be taken with respect to their status as employees of Albemarle Paper Company.

7. Plaintiffs recognize that an individual has a right to select his own counsel to prosecute any of his claims and that his choice of counsel should be unfettered. Plaintiffs submit that the willingness of a number of the black employees of Albemarle Paper Company to rely on and consult with present counsel in assisting in the preparation of this claim establishes a prima facie showing that the representation of present counsel is adequate.

8. The notice of July 6, 1971 to some class members provides in one part that if a member does not indicate to the Court by July 22, 1971 that he chooses not be represented by present counsel, then any judgment favorable or unfavorable will be binding upon him. The notice in another part requires members to submit a statement to the Court in writing, under oath, of the amount of back pay he has suffered if unlawful discrimination is found and provides that his claim for back pay, if not noted by July 22, 1971, will be forever barred. Counsel cannot affectively represent the interest of a class member if he is prohibited

from discussing all relief to which that member is entitled if a violation is established. Plaintiffs submit that the terms of the present order affectively prohibits counsel for plaintiffs from discussing a member's or a potential member's claim freely and advising him of all relief to which he may be entitled.

9. Plaintiffs submit that the ruling of the Court limiting communication between counsel and plaintiffs and actual and potential members of their class, particularly at this stage of the proceedings, raises serious questions under the First Amendment to the Constitution of the United States guaranteeing the right to free speech and association and decision of the Supreme Court of the United States in *NAACP* v. *Button,* 371 U.S. 415 (1963). See also *United Transportation Union, Petitioner* v. *The State Board of Michigan,* 39 U.S.L.W. 4428 (1970) and *Brotherhood of Railroad Trainmen* v. *Virginia State Bar,* 377 U.S. 1 (1964).

Since the mailing of the notice by the Court, black employees of Albemarle Paper Company have contacted the named members in this action requesting advice and explanation of the notice and requesting that Joe P. Moody contact present counsel for advice. The only advice allowable under the present orders is that contact be made with the Clerk of the Court. Counsel for plaintiffs have so advised the named plaintiffs that this could be the only extent to which they could discuss the present status of the case.

Attached herewith in support of this motion is the Affidavit of Joe P. Moody.

Wherefore, for the reasons stated above, plaintiffs respectfully request the Court to enter an order granting

leave to counsel for plaintiffs to communicate with actual and potential class members for the purposes stated above.

This 13th day of July, 1971.

Respectfully submitted,

.....

Robert Belton

J. LeVonne Chambers
Chambers, Stein, Ferguson & Lanning
237 West Trade Street
Charlotte, North Carolina

T. T. Clayton
307 West Franklin Street
Warrenton, North Carolina

Conrad O. Pearson
203½ East Chapel Hill Street
Durham, North Carolina

Jack Greenberg
William Robinson
10 Columbus Circle
New York, New York 10019

Attorneys for Plaintiffs

State Of North Carolina)
Mecklenburg County) Affidavit

Joe P. Moody first being duly sworn deposes and says:

1. My name is Joe P. Moody and I reside at Route 1 Box 128, Roanoke Rapids, North Carolina. I am a plaintiff in the case styled *Joe P. Moody, et al.,* v. *Albemarle Paper Company, et al.,* C.A. No. 989, pending in the United States District Court for the Eastern District of North Carolina.

2. After receiving notice from the Clerk for the United States District Court advising of the pendency of the lawsuit, I was approached by several black persons who were employees or former employees of Albemarle Paper Company requesting some explanation of the notice.

3. I am of the opinion that many of the persons who have received notices from the Clerk do not completely understand the content of the notice nor what they are obligated to do pursuant to the Notice.

The foregoing has been read to me and is fully understood by me to be accurate and true.

/s/ Joe P. Moody
Joe P. Moody

[Jurat Omitted in Printing]

In The

UNITED STATES DISTRICT COURT

FOR THE

Eastern District of North Carolina

Wilson Division

[Title Omitted in Printing]

(Civil Action No. 989)

MOTION FOR CLARIFICATION

[Filed July 14, 1971]

Plaintiffs move the Court, by their undersigned attorney, for clarification of the Notice, dated July 6, 1971, directed to all black employees of Albemarle Paper Company at its Roanoke Rapids plant Roanoke Rapids, North Carolina and all members of the class as designated in the Order of June 15, 1971. The basis for this motion is as follows:

1. Paragraph (b) on page 2 of the Notice provides, "if you do not request exclusion from the class by July 22, 1971, you will be included in such class and any judgment, whether favorable or not, including any judgment approving any settlement of the action, will be binding upon you." Paragraph (d) on page 2 of the Notice provides, "in the event you are claiming damages of any of the defendants by reason of any alleged racially discriminatory practice, you must file your written proof of claim under

oath with the Clerk of the U.S. District Court at the address shown herein stating the details of such alleged discrimination and the amount of damages you are claiming. Such claim must be mailed not later than July 22, 1971, or it will be forever barred."

2. According to paragraph (b) referred to above, failure of a class member to request exclusion results in a binding judgment on that member whether favorable or unfavorable. Further, failure to request exclusion means that present counsel must represent that member in the trial of this matter. On the other hand, failure to request exclusion and failure to file proof of damages under oath by July 22, 1971, results in the barring of the damage claim of that member notwithstanding the fact that he is represented by counsel and counsel have been ordered not to discuss the case with members who are not formal parties to the action unless permission is received from the Court. Plaintiffs submit that this posture of the case seriously diminishes the opportunity for counsel to advise class members.

3. Paragraph (b) speaks in terms of "judgment" and "settlement." We submit that reference to judgment in paragraph (b) in the Notice encompasses all the relief to which the class members may be entitled after trial or any settlement, including damages. Plaintiffs contend that back pay is not a separate and distinct kind of relief which should not be included in the judgment; the effect of paragraph (b) is to make this distinction. See *Robinson* v. *Lorillard*, Slip Op., pp. 25-28, No. 15, 098 (4th Cir. July 1, 1971).

4. Plaintiffs submit that the law is unclear on the method by which back pay, if allowed, should be computed. Plaintiffs have submitted a suggested method of computation in

their Further Answers to Interrogatories filed on July 10, 1971. While plaintiffs may urge the court to adopt the method of computation as suggested in Further Answers, the court has not yet decided that this will be the method of computation. This raises a question of how actual or potential members of the class are to compute the damages by July 22, 1971.

5. The Notice provides that if any of the actual or potential class members have questions concerning the Notice, then he may write or call the office of the clerk of the U.S. District Court. Is the clerk authorized to advise those persons who may call how their damages are to be computed when the court itself has not made such a determination? If the clerk is not authorized to so advise, is the clerk authorized to refer him to, or appoint, an attorney to assist him in computing his back pay claim if the member questions the adequacy of present counsel? See 706(e) of Title VII.

6. Assuming that a persons does not contact the clerk of Court plaintiffs' counsel, under the Notice, will represent him, but is plaintiffs' counsel barred from making a claim for damages for back pay on the part of that person after July 22, 1971?

7. Counsel for the plaintiffs were aided in responding to the requirement that plaintiffs specify the amount of back pay that each member claims to have suffered by records copied pursuant to an Order of the court; these records were incomplete. These records have not been made available to actual or potential members of the class. To require the class members to specify the amount of damages without the aid of such records and more particularly without the aid of an attorney, is to require class members to do without necessary assistance.

Wherefore, plaintiffs respectfully pray the Court to clarify its Notice of July 6, 1971.

This 13th day of July, 1971.

Respectfully submitted,

Robert Belton

J. LeVonne Chambers
Chambers, Stein, Ferguson & Lanning
237 West Trade Street
Charlotte, North Carolina

T. T. Clayton
307 West Franklin Street
Warrenton, North Carolina

Conrad O. Pearson
203½ East Chapel Hill Street
Durham, North Carolina

Jack Greenberg
William Robinson
10 Columbus Circle
New York, New York 10019

Attorneys for Plaintiffs

In The
UNITED STATES DISTRICT COURT
FOR THE
Eastern District of North Carolina
[Title Omitted In Printing]
(Civil Action No. 989)

MOTION FOR SEVERANCE AND THE APPOINTMENT OF A MASTER

[Filed July 14, 1971]

Plaintiffs move, by the undersign attorney, for entry of an order by the court that the issue of the determination of the amount of back pay be the subject of a special proceeding separate and apart from the determination of the issue of liability. Plaintiffs further move the court to refer matter of the determination of the amount of back pay to a special master, pursuant to Rule 53 of the Federal Rules of Civil Procedure, should the court find that the plaintiffs or any of their class have suffered an economic loss as a result of the complanied of racially discriminatory employment practices by any or all of the defendants.

As grounds for this Motion, Plaintiffs show the court as follows:

1. The severance of the determination of the amount of back pay from the determination of liability would expedite the final determination of this matter. The court may make a finding on evidence introduced to establish a violation of Title VII, that plaintiffs have not made out their claim and therefore the Court would not have to reach the issue of back pay or determination of the amount.

2. Plaintiffs submit that the determination of the amount of back pay, should the Court decide that back pay is ap-

propriate, will involve the examination of employees' records, qualifications of employees and mathematical computation of claims. These are matters which should be referred to a special master.

3. In this connection we call the Court's attention to *Robinson* v. *Lorillard*, No. 15,098 (4th Cir. July 1, 1971) and *Sprogis* v. *United Air Lines*, ... F.2d ....., 3 EPD Para. 8239 (No. 18481, June 16, 1971).

This 13th day of July 1971.

Respectfully submitted,

Robert Belton
J. LeVonne Chambers
Chambers, Stein, Ferguson & Lanning
237 West Trade Street
Charlotte, North Carolina

T. T. Clayton
307 West Franklin Street
Warrenton, North Carolina

Conrad O. Pearson
203½ East Chapel Hill Street
Durham, North Carolina

In The

UNITED STATES DISTRICT COURT

FOR THE

Eastern District of North Carolina

Wilson Division

[Title Omitted In Printing]

PROOF OF CLAIM

[Filed July 15, 1971]

124 Matthew Street
Roanoke Rapids, N. C.
July 14, 1971

To whom it may concern:

I have been employed at Albemarle Paper Mill since 1950. I have worked on a regular job there for 13 years. During that time I have worked on different jobs. During that time my seniority was taken from me and I had to work under the authority of men who had not been working there even as much as half the time that I have. Also, I was told that the only time that I would have a job was when someone went on vacation or if someone was sick.

Furthermore, they made it necessary for me to install a phone. I have had to sit at home many times in order to wait for a call. If I missed three calls I was not even allowed to get a slip to the employment office so that I could draw unemployment. They have hired quite a number of men since then, but I am still on the board filling out vacation and sick calls.

I cannot give any figures on what they owe me, but I do want my backpay and to 40 hours a week. Also I would like to have my seniority back and to be placed where I should be. I'm afraid I don't know where that should be, but my regular job was unloading salt cake. I am a part of a discriminated group. I want my rights and a regular job back.

Thank you for what you have tried to do.

Yours truly,

/s/ Mr. Eulis K. Lawson

In The

UNITED STATES DISTRICT COURT

FOR THE

Eastern District of North Carolina

Wilson Division

[Title Omitted In Printing]

PROOF OF CLAIM

[Filed July 19, 1971]

Star Route, Box 88-A
Roanoke Rapids, North Carolina 27870
July 17, 1971

Clerk of the United States District Court
Post Office Box 25670
Raleigh, North Carolina 27611

Dear Sir:

It is my concern to remain with Joseph P. Moody, et al., Plaintiffs vs. Albemarle Paper Company, et al., Defendants —Civil No. 989.

In reply to the notice filed with the United States District Court for the Eastern District of North Carolina Wilson Division on August 25, 1966, by Plaintiffs, I have been employed with the Albemarle Paper Company, Roanoke Rapids, North Carolina, since 1947. I am in no position to determine an unpaid amount in salary up to date in accordance to my position of employment.

Yours truly,

/s/ Johnie Easter

In The

UNITED STATES DISTRICT COURT

FOR THE

Eastern District of North Carolina

Wilson Division

[Title Omitted In Printing]

PROOF OF CLAIM

[Filed July 19, 1971]

Clerk of the United States District Court
Eastern District of North Carolina
P. O. Box 25670
Raleigh, North Carolina 27611

Re; Joseph P. Moody et al., vs. Albemarle Paper Company
Civil No. 989

Dear Sirs:

I wish to be a part of the above named Civil Action, I accepted employment with Albemarle Paper Company, Roanoke Rapids Plant on, December 1950. I was forced to seek employment elsewhere on, January 1966, due to the discriminatory practices of this employer. I wish to claim back pay, but due to the inability to state where I would be on present seniority list, due to the discriminatory practices of the above named employer, I ask that after all, factors are settled which pertain to seniority, that I be awarded back pay in line with my employment date with this company.

The above named employer discriminated against me in the form of testing by stating that I did not have the ability to hold positions, as the results of this testing. I am now a resident of the state of New Jersey, have passed the requirements of this state as a Shift Engineer, Power Plant Operator. I request that the present Attorneys for the Plaintiffs, also be considered as my Attorneys, My present address is as follows. Theodore Roosevelt Brown, 138 North 14th Street, East Orange New Jersey,

I enter this claim as a Class Action, because of race, under the Civil Rights Act of 1964.

I Theodore Roosevelt Borwn [sic], here by state under oath, that I have read the above and, sign the above under my own will.

/s/ Theodore Roosevelt Brown

[Jurat Omitting In Printing]

In The
UNITED STATES DISTRICT COURT
FOR THE
Eastern District of North Carolina
Wilson Division

[Title Omitted In Printing]

PROOF OF CLAIM

[Filed July 21, 1971]

Ethoria Jones
133 Lincoln Ave.
Roanoke Rapids, N. C.
27870

Dear Sirs:

I have filed a Claim with Mr. Joseph P. Moody attorney for damages. i was on Lay off for Over a year, and i Was Put on Call Board for Over 3 years. When the younger *White* Men was working. On some Jobs that i Now Opprate, But Before i Was not given the chance. iam still on Call Board and these same *White* men are still working. Some of the Jobs the *Black* Man is working. i did have the chance to work until the last past year.

Now the dates and the times i can not send you to day. for Mr. Joseph P. Moody attorney have that information.

the Amount of Damages i Cant say. Because for years this have went on. Over me. And all Other *Black* men at the *Plant*.

Yours truly

/s/ Ethoria Jones
133 Lincoln Ave.
Roanoke Rapids, N. C.
27870

phone—537-9990.

In The

UNITED STATES DISTRICT COURT

FOR THE

Eastern District of North Carolina

Wilson Division

[Title Omitted In Printing]

PROOF OF CLAIM

[Filed July 23, 1971]

Clerk of the United States District Court
Eastern District of North Carolina
P.O. Box 25670
Raleigh, North Carolina 27611

Re; Joseph P. Moody et al, vs Albemarle Paper Company
Civil No. 989

Dear Sirs:

I wish to be a part of the above named Civil Action: I accepted employment with Albemarle Paper Company, Roanoke Rapids Plant at Roanoke Rapids, North Carolina. Due to discriminatory practices of this employer, some were forced to seek employment elsewhere. I wish to claim back pay, but due to the inability to state where I would be on the present seniority list; due to the discriminatory practices of the above named employer, I ask that after all factors are settled which pertain to seniority, that I be awarded back pay in line with my employment date with this company.

The above named employer discriminated against me in the form of testing, by stating that I did not have the ability to hold positions, as the results of this testing.

I request that the present Attorneys for the Plaintiffs, also be considered as my Attorneys. My present address and name is attached.

I enter this claim as a Class Action; because of race, under the Civil Rights Act of 1964.

I have read the above, and sign the above under my own will.

Name/Address

Thomas Kearsey, Rba, Box 127 R.R.

Leroy Jordan, 515 West First St., Weldon, N. C.

William Thomas Vasser, Box 187, Garysburg, N. C.

Willie Joseph Bradley, 112 Prospect Ave., Weldon, N. C.

Jack Norton, P. O. Box 165, Garysburg, N. C.

Alexander Sledge, 706 W. F St., Weldon, N. C.

Reny Cowan, 524 W. First St., Weldon, N. C.

Leon Quick, P. O. Box 441, Roanoke Rapids, N. C.

Clarence Daniel, Roanoke Rapids, N. C.

Elizah Daniel, Roanoke Rapids, N. C.

Cecil M. Pierce, Rte. 2, Box 487, (Deceased)

East Hawkins, 1903 Glover St., Roanoke Rapids, N. C. (Deceased)

W. M. Martin, Rte. 1, Box 431, Roanoke Rapids, N. C.

Asa Roone, R 2, Box 50B, Roanoke Rapids, N. C.

William Garris, R. 1, Box 29, Garysburg, N. C.

Moses L. Garner, Route 1, Box 129A, Roanoke Rapids, N. C.

Name/Address

Hosea Roberts, 605 West 1st St., Weldon, N. C.

Robert McNair, Jr., 407 County Rd. (Deceased)

Paul C. Ingram, 1214 Snead

Willie H. Mason, Star Rt. Box 87

Jimmy V. Love, Route 626, Box 52, Valentine, Va.

Andrew M. Johnson, Rte. 1, Box 213, Jackson, N. C.

Otis Jones, Route 1, Box 107, Roanoke Rapids, N. C.

Eugene Neville, 130 Ligon St., Roanoke Rapids, N. C.

Willard Bufield, Box 30, Rt. 1, Garysburg, N. C.

F. B. Hardy, 334 E. Littleton Rd., Roanoke Rapids, N. C.

Richard Squire, 1914 Glover St., Roanoke Rapids, N. C.

Robie Mason, Star Rt., Box 134B, Emporia, Va.

Isaac M. Weaver, Rt. 2, Box 52, Lawrenceville, Va.

Eugene Vincent, Box 53, Henrico, N. C. (Deceased)

Mack Coy Boone, P. O. Box 38, Garysburg, N. C.

Sandy L. Johnson, 127 Poplar St., Roanoke Rapids, N. C.

William Town, RFD 216, Roanoke Rapids, N. C.

Ernest Gardner, 1929 Glover St., Roanoke Rapids, N. C.

James Mallory, 109 Prospect Ave., Weldon, N. C.

James Alfred Jones, 118 Lincoln Ave., Roanoke Rapids, N. C.

Name/Address

Jeremiah Webb, 307 Holm Dr., Weldon, N. C.

Frank Mayo, Rt. 2, Box 381M, Roanoke Rapids, N. C.

Charlie D. King, Star Route, Box 145, Emporia, Va.

Johnie E. Roberts, P. O. Box 453, Gaston, N. C.

Nonnie King, Star Route, Box 34, Roanoke Rapids, N. C.

Johnie Easter, Star Route, Box 88-A, Roanoke Rapids, N. C.

Julian Peebles, Rte 2, Box 279, Halifax, N. C.

*Mah..... H. Aven....., 154 Carver St., Roanoke Rapids, N. C.

Lonnie Lastrom, Box 132

J. T. Martin, 1939 Church St., Roanoke Rapids, N. C.

James Harris, Box 234, Garysburg, N. C. (Deceased)

Clarence High, Rt. 2, Box 381J, Roanoke Rapids, N. C.

Amos Harris, Henrico, N. C., Box 55

Eulis K. Lawson, 124 Matthews St., Roanoke Rapids, N. C.

Alfred P. Kidd, Route 1, Box 15C, Garysburg, N. C.

Willi Jones, 307 Kitchen St., Roanoke Rapids, N. C.

Jake Alston, Rt. 3, Box 326T, Littleton, N. C.

Robert Lee Alston, 127 Poplar St., Roanoke Rapids, N. C.

Gilbert Lee Harding, Rt. 1, Box 137, Pleasant Hill,

* Where deletions occur, individual handwriting was illegible.

Name/Address

Davie Daniel Harding, Jr., Rt. 1, Box 9, Pleasant Hill

Herman Johnson, Route 2, Box 439C, Roanoke Rapids, N. C.

Samuel Moody, Star Rt. Box 23B, Roanoke Rapids, N. C.

Carlton Belfield, P. O. Box 187, Gaston, N. C.

Willie A. Ashe, Rte. 2, Box 272, Littleton, N. C.

Mason Vincent, Rt. 211, Box 54, Garysburg, N. C.

Ethoria Jones, 133 Lincoln Ave., Roanoke Rapids, N. C. 27870

R. R. Scott, Rt 1, Box 166, Garysburg, N. C.

Eugene Harris, P. O. Box 121, Seaboard, N. C.

L. G. Cooke, 308 Poplar St., Weldon, N. C.

[Jurat Omitted In Printing]

Clerk of the United States District Court
Eastern District of North Carolina
P. O. Box 25670
Raleigh, North Carolina 27611

Re; Joseph P. Moody et al, vs Albemarle Paper Company Civil No. 989

Dear Sirs:

I wish to be a part of the above named Civil Action: I accepted employment with Albemarle Paper Company, Roanoke Rapids Plant at Roanoke Rapids, North Carolina. Due to discriminatory practices of this employer, some were forced to seek employment elsewhere. I wish to claim

back pay, but due to the inability to state where I would be on the present seniority list; due to the discriminatory practices of the above named employer, I ask that after all factors are settled which pertain to seniority, that I be awarded back pay in line with my employment date with this company.

The above named employer discriminated against me in the form of testing, by stating that I did not have the ability to hold positions, as the results of this testing.

I request that the present Attorneys for the Plaintiffs, also be considered as my Attorneys. My present address and name is attached.

I enter this claim as a Class Action; because of race, under the Civil Rights Act of 1964.

I have read the above, and signed the above under my own will.

Name/Address

Jesse Mallory, Rt. ...., Box 20A, Garysburg, N. C.

Robert E. Coleman, Box 121, Garysburg, N. C.

Edward S. Lee, Box 22, Garysburg N. C.

John Juniaiso Jarrell, Rt. 1, Box 151, Roanoke Rapids, N. C.

Wom Jarrells, Rt. 1, Box 342, Roanoke Rapids, N. C.

Alphonso Owens, Star Rt., Box 82, Roanoke Rapids, N. C.

Walter Woul, Jr., P. O. Box 78, Garysburg, N. C.

[Jurat Omitted In Printing]

In The

UNITED STATES DISTRICT COURT

FOR THE

Eastern District of North Carolina

Wilson Division

[Title Omitted In Printing]

PROOF OF CLAIM

[Filed July 23, 1971]

Clerk of the United States District Court
Eastern District of North Carolina
P. O. Box 25670
Raleigh, North Carolina 27611

Re; Joseph P. Moody et al vs Albemarle Paper Company
Civil No. 989

Dear Sirs:

I wish to be a part of the above named Civil Action: I accepted employment with Albemarle Paper Company, Roanoke Rapids Plant at Roanoke Rapids, North Carolina. Due to discriminatory practices of this employer, some were forced to seek employment elsewhere. I wish to claim back pay, but due to the inability to state where I would be on the present seniority list; due to the discriminatory practices of the above named employer, I ask that after all factors are settled which pertain to seniority, that I be awarded back pay in line with my employment date with this company.

The above named employer discriminated against me in

the form of testing, by stating that I did not have the ability to hold positions, as the results of this testing.

I request that the present Attorneys for the Plaintiffs, also be considered as my Attorneys. My present address and name is attached.

I enter this claim as a Class Action; because of race, under the Civil Rights Act of 1964.

I have read the above and signed the above under my own will.

/s/ Charlie C. Jones
Rt. 1, Box 138
Roanoke Rapids, N. C.

/s/ Clarence Sorrell
Henrico, N. C.

[Jurat Omitted In Printing]

In The

UNITED STATES DISTRICT COURT

FOR THE

Eastern District of North Carolina

Wilson Division

[Title Omitted In Printing]

PROOF OF CLAIM

[Filed July 26, 1971]

Clerk of the United States District Court
Eastern District of North Carolina
P. O. Box 25670
Raleigh, North Carolina 27611

Re; Joseph P. Moody et al, vs Albemarle Paper Company
Civil No. 989

Dear Sirs:

I wish to be a part of the above named Civil Action: I accepted employment with Albemarle Paper Company, Roanoke Rapids Plant at Roanoke Rapids, North Carolina. Due to discriminatory practices of this employer, some were forced to seek employment elsewhere. I wish to claim back pay, but due to the inability to state where I would be on the present seniority list; due to the discriminatory practices of the above named employer, I ask that after all factors are settled which pertain to seniority, that I be awarded back pay in line with my employment date with this company.

The above named employer discriminated against me in the form of testing, by stating that I did not have the ability to hold positions, as the results of this testing.

I request that the present Attorneys for the Plaintiffs, also be considered as my Attorneys. My present address and name is attached.

I enter this claim as a Class Action; because of race, under the Civil Rights Act of 1964.

I have read the above, and sign the above under my own will.

Name/Address

Robert Avon, Box 3-9, Roanoke Rapids, N. C.

Joe Bagett, Jr., Box 1343, Roanoke Rapids, N. C.

Robert Paul, Jr., 503 West First St., Weldon, N. C.

Adolphus L. Scott, 10 Popular St., Weldon, N. C.

Thornton M. Majette, Garysburg, Box 135

[Jurat Omitted In Printing]

In The

UNITED STATES DISTRICT COURT

FOR THE

Eastern District Of North Carolina

Wilson Division

[Title Omitted In Printing]

STIPULATION OF FACTS

[Filed July 25, 1971 and admitted in evidence as a joint unnumbered exhibit (R. 37)]

It is hereby stipulated by and among counsel for the plaintiffs; counsel for the defendant, Albemarle Paper Company, a Virginia corporation; counsel for the defendant, Albemarle Paper Company, a Delaware corporation, counsel for the defendant Hoerner Waldorf, a Delaware corporation, counsel for the defendant, Ethyl Corporation, a Virginia corporation and counsel for the defendant, Halifax Local No. 425, United Papermakers and Paperworkers, AFL-CIO, that the following facts are true to the best of the knowledge and belief of all parties:

Exhibit A

1. Plaintiffs Joseph P. Moody, Theodore Daniels, Henry Hill and Arthur Mitchell are Negro citizens of the United States and the State of North Carolina, residing in the County of Halifax, North Carolina.

2. Defendant Albemarle Paper Company, the Virginia corporation, operated a pulp and paper plant in Roanoke

Rapids, North Carolina at the time this action was filed on August 25, 1966. Albemarle Paper Company (Virginia) was at the time suit was filed a wholly owned subsidiary of defendant Ethyl Corporation, a Virginia corporation. On October 31, 1968, during the pendency of this action, the Roanoke Rapids plant was transferred to defendant Albemarle Paper Company, a Delaware corporation, which is a subsidiary of defendant Hoerner Waldorf Corporation, also a Delaware corporation. Since November 1, 1968, the Roanoke Rapids plant has been operated by the Albemarle Paper Company (Delaware). The particular plant here involved is the Roanoke Rapids plant.

3. Plaintiffs Moody, Daniels and Hill were employed at the Roanoke Rapids plant for several years. Plaintiff Moody was initially employed in September, 1952. Plaintiff Hill was initially employed in October, 1947. Plaintiff Mitchell was initially employed in 1922; and he retired during the pendency of this action. Plaintiff Daniels, initially employed in 1955, has been promoted to the position of Service Crew Foreman, a position outside the collective bargaining unit.

4. As of June 30, 1967, approximately 637 persons were employed in production and maintenance jobs at the Roanoke Rapids plant. Of these approximately 120 were Negroes; 517 were white.

5. Defendant Halifax Local No. 425, United Papermakers and Paperworkers, AFL-CIO "the Union," is a local labor organization which is and has been a party to collective bargaining agreements with Albemarle Paper Company (Virginia) pertaining to certain production and maintenance employees at the Roanoke Rapids plant and negotiates on their behalf concerning the wages, terms and conditions of employment with respect to those employees.

The Union is engaged in an industry which affects interstate commerce and has more than 100 members. The Union is a labor organization within the meaning of Sections 701(d) and (e) of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e(d) and (e). The plaintiffs are or have been members of the Union.

6. The principal business carried on at the Roanoke Rapids plant is the production of kraft paper, pulp and allied products. Since prior to 1950, certain production and maintenance employees at the Roanoke Rapids plant have been covered by collective bargaining agreements. Accordingly, all such employees have been classified for purposes of pay and seniority in accordance with Appendices A, C and F of the collective bargaining agreements or labor contracts attached hereto and designated as Exhibit 1 through 4 of this stipulation. (Exhibit No. 1 is the 1968 contract and Exhibit No. 2 is the 1965 contract; Exhibit No. 3 is the 1963 contract and Exhibit No. 4 is the 1961 contract).

7. The collective bargaining units at the Roanoke Rapids plant consists of all permanent employees with the exception of clerical employees, watchmen, wood procurement employees, technical employees, guards and supervisors.

8. The Roanoke Rapids plant originally started in 1970. In 1937, when defendant Albemarle Paper Company (Virginia) acquired the facility known then as the Halifax Paper Company, the various lines of work were either all white or all black. These lines of progression were formalized about 1954 or 1955. Copies of the lines of progression for the 1961, 1963, 1965 and 1968 labor contracts are attached hereto as Exhibit Nos. 1 through 4.

9. In accordance with Appendix F of the labor contracts, certain jobs are grouped into various lines of progression.

Using Appendix F of the 1965 contract as a point of reference, defendant Albemarle Paper Company (Virginia) did not, to the best of its knowledge, have any Negro employees permanently assigned in certain lines of progression prior to January 1, 1964. In this respect, there were no Negro employees permanently assigned in the Yard Crew line of progression in the Wood Yard Department; the knife grinder job classification; the Paper Machine line of progression in the A Paper Mill Department; the Beaterman line of progression in the Beater Room of the A Paper Mill; the Finishing Crew line of progression in the Product Department B Mill; the Shipping Crew line of progression in the Product Department B Mill; the Digester Operator and CE Recovery Operator lines of progression in the Pulp Mill Department; the Paper Machine Line of progression in the B Paper Mill Department; the Stockroom line of progression in the B Paper Mill Department; the Boiler Operator line of progression in the Boiler Room Department; and the Mill and the Laboratory lines of progression in the Technical Service Department.

10. Prior to January 1, 1964, the defendant Albemarle Paper Company (Virginia) did not, to the best of its knowledge, have any permanent white employees in certain lines of progression. In this respect, there were no permanent white employees in the Chipper Operator line of progression in the Wood Yard Department; the Services Crew line of progression in the Wood Yard Department and the Brokeman line of progression in the A Paper Mill Department; the Lead Loader Line of Progression in the Finishing Room Department A Mill; the Payloader line of progression in the Pulp Mill Department; the First Fireman line of progression in the Boiler Room Department and the "dead end" janitor classification.

11. In the 1968 labor contract certain changes were made in the lines of progression. (See Exhibit No. 1 to this Stipulation, Appendix F.) In this respect, the Chipper Operator line of progression and the Yard Crew line of progression were merged on the basis of rates of pay into one line of progression as shown on Appendix F of the 1968 labor contract; the First Fireman line of progression and the Boiler Operator line of progression in the Boiler Room Department were merged into one line of progression; a separate Kamyr Department was formed by taking the Kamyr Operator classification out of the Pulp Mill Department and combining that classification with the Lift Truck Operator and classifications of Baler and Laborer and making them into a separate line of progression as set forth in Appendix F in the 1968 labor contract; the Utility Helper classification formerly the Lancer classification was added to the CE Recovery line of progression in the Pulp Mill. The Service Crew line of progression was changed by adding the Payloader classification from the Pulp Mill Department to the top of that line and a separate Service Department was established. In the A Paper Mill Department the Brokeman line of progression was merged into the Beaterman line of progression. The "dead end" jobs of janitor in the A Paper Mill Department and Pulp Mill Departments were eliminated.

12. The racial composition by departments and job classifications at the Roanoke Rapids plant as of June 30, 1967 was as follows:

	Negro	*White*
A. *Wood Yard Department*		
Yard Crew		
Crane Operator (Large)	0	9
Long Log Operator	0	4
Log Stacker Operator	0	4
Small Equipment Operator	0	4
Bulldozer Operator	0	1
Oiler	0	4
Chip Unloader	1	3
Chain Operator	0	4
Chipper Operator No. 2		
Chipper Operator No. 1	4	0
Tractor Operator	5	0
Chip Bin Operator	4	0
Laborers	12	0
*Knife Grinder	0	1
Service Crew		
Dempster-Dumpster	1	0
Winch Truck Operator	3	0
Winch Truck Operator Helper	1	0
Laborer	6	0
B. *Pulp Mill Department*		
Digester Operator	0	4
Stock Room Operator	0	4
Stock Room First Helper	0	4

* The Knife Grinder is in the Wood Yard Department but is not in a line of progression. This position is occupied by a white person.

	Negro	*White*
Kamyr Operator	0	4
Stock Room Second Helper	0	4
Lead Loader-Blower	0	4
Loader	0	10
C.E. Recovery Operator	0	4
1st Helper No. 6	0	4
Second Helper	0	4
Caustic Operator	0	4
Lime Kiln Operator	0	4
General Utility Operator	0	1
By Products Operator	0	2
Payloader	1	0
Lancer	4	0
Salt Cake Man	1	0
Janitor—Dead End Job	1	0

C. *A Paper Mill Department*

Paper Machine Line Of Progression

Machine Tender No. 1	0	4
Machine Tender No. 2	0	4
Back Tender No. 1	0	4
Third Hand No. 1	0	4
Third Hand No. 2	0	4
Fourth Hand No. 1	0	4
Fourth Hand No. 2	0	4
Front Plugger No. 1	0	4
Back Plugger No. 1	1	4
Back Plugger No. 2	0	4
Beaterman	0	4
1st Helper	0	4
Brokeman	4	0
Stock Puller	0	0
Laborer	1	0

D. *B Paper Mill Department*	*Negro*	*White*
Machine Tender	0	8
Back Tender	0	8
Third Hand	0	8
Fourth Hand	0	8
Fifth Hand	0	8
Sixth Hand	0	8
Seventh Hand	0	4
Spare Hand	1	5
Janitor—Dead End Job	5	0
Stock Room Operator	0	4
Stock Room 1st Helper	0	4
Stock Room 2nd Helper	0	4

E. *Product Department B Papermill*		
Sheeter Operator	0	2
Rewinder Operator (large)	0	4
Rewinder Operator Helper (large)	0	4
Rewinder Operator (small)	0	4
Sheeter Operator Helper	0	4
Wrapper, Tier, Capper	1	16
Rewinder Plugger	1	2
Core Cutter	0	2
Janitors	3	0
Scale Clerk	0	5
Lift Truck Operator	0	13
Utility Man	0	8
Laborers	0	6

	Negro	*White*
F. *A Mill Finishing Department*		
Lead Loader	1	0
Lift Truck Operator	1	0
Lead Tier & Wrapper	1	0
Wrapper, Loader & Brokeman	2	0
G. *Boiler Department*		
Boiler Operator	0	4
H. *Power Plant Department*		
Power Plant Operator	0	4
1st Helper	0	4
2nd Helper	0	4
Utility Man	0	4
I. *Technical Service Department*		
B Mill Shift Testman	0	4
A Mill Shift Testman	0	4
General Lab Testman	0	2
Lab Trainee	1	10
Lab Assistant	0	2
Lab Leadman	0	1
J. *Storeroom Department*		
Storeroom Clerk A	0	2
Storeroom Clerk C	0	1
Storeroom Clerk D	0	0
K. *Maintenance Department Employees*		
1st Maintenance Emp. Appren.	0	1
2nd Maintenance Emp. Appren.	0	9
3rd Maintenance Emp. Appren.	0	4

	Negro	*White*
4th Maintenance Emp. Appren.	0	2
5th Maintenance Emp. Appren.	0	7
6th Maintenance Emp. Appren.	1	0
7th Maintenance Emp. Appren.	0	1
8th Maintenance Emp. Appren.	0	1
"C" Maintenance Employee	0	3
"B" Maintenance Employee	0	3
"A" Maintenance Employee	0	99
Leadman Maintenance Employee	0	7

L. *Miscellaneous*

General Extra Board	2	62
Utility Extra Board	50	0
Truck Drivers	0	4

13. Promotion within a line of progression is governed by seniority and ability. Sections 10.1.1 of the 1965 and 1968 Labor Agreements provide in part that "when all factors that constitute ability are relatively equal, then seniority in keeping with established lines of progression within a given department (as shown on attached Appendix F) shall prevail."

14. Three kinds of seniority are provided for in the labor agreements—job, department and plant: (A) *Job seniority* is defined as total length of continuous service in a particular job classification; seniority in a higher job(s) in the same line of progression shall be counted toward job seniority in lower job(s) in said line of progression; (B) *Department seniority* is defined as length of continuous service in one of the departments listed in Appendix F; (C) *Plant seniority* is defined as length of continuous service from most recent date of employment.

15. The seniority system employed basically utilizes job seniority for promotions and demotions. Sections 10.4.2 of the 1965 and 1968 Labor Agreements provide:

> When the vacancy or reduction is expected to continue for a period of more than two (2) weeks, job seniority in accordance with the provisions of 10.1.1 [see 13 *supra*] will apply across all shifts of the line of progression. Employees will be laid off and rehired from the bottom of the line, in accordance with this provision.

This means that the employee who has the greater seniority in the job immediately below the vacancy to be filled will normally be given the first opportunity to fill the vacancy even though other employees in the same job classification have more plant and departmental seniority assuming that the person has the necessary ability, experience and training to do the higher job.

16. The 1965 labor agreement Section 10.2 provided that employees could request transfers from one department (or line of progression) to another department (or line of progression). This provision was contained in the labor agreements prior to 1965. Whether or not the transfer was granted was within the sole discretion of the company. If an employee transferred at his own request, his seniority in his former department or line of progression ceased immediately unless within 30 days the employee returned to his former department or line of progression because of his health or physical condition. When the transfer is effected at the request of the company, his seniority in the department (or line of progression) left shall be retained for a period of six months from date of transfer. An employee transferred under Sections 10.2 of the 1965 labor agreement would, absent special circumstances, enter at

the bottom job in the line of progression and could suffer a reduction in pay if that job to which he was permitted to transfer to carried a rate of pay less than the job from which the employee transferred.

17. In 1968, the Labor Agreement was amended to read:

> "10.2.1 Employees who wish to transfer from one department (or line of progression) to another may file through their foreman with the Personnel Department of the Company written application stating the department (or line of progression) and the job therein to which he wishes to be transferred. The decision of the Company in granting or denying such request for transfer is to be final. However, when an employee transfers from one department (or line of progression) to another upon his own request, his seniority in the department (and line of progression) left shall cease immediately unless within thirty (30) days from the date of such transfer the health or physical condition of such employee makes it advisable to transfer him back to the department (or line of progression) left. Where the transfer is effected at the request of the Company, his seniority in the department (or line of progression) left shall be retained for a period of six months from date of transfer.
>
> "10.2.2 When the Company grants a transfer as described in 10.2.1, then the transferred employee will be vested with department and job seniority equal to that held in his last job or equal to that held in the lowest job in the line of progression from which transferred.

"10.2.3 When the Company grants such a transfer as described in 10.2.1, then the transferred employee will be paid his present rate if higher than the rate of the job to which transferred until such time as the employee progresses to a job in the new line of progression which pays as much or more than his rate in his last classification in his former line of progression. An employee who is permitted to carry a higher rate to another department or line of progression shall have such rate reduced to the rate of the job to which he is transferred if the employee is deemed at the time a 'permanent' vacancy occurs in the next higher job in the new line of progression to be unqualified for such job, or with the Company's approval declines a promotion to such a job. Such an employee shall not lose his 'red circle' rate if deemed unqualified and the sole reason for his lack of qualification is a determination by the Company that he has not had sufficient time in the new line of progression to obtain the training and experience necessary for promotion. In applying Section 10.2.1, if the Company decides to fill a vacancy by transferring an employee who has made application pursuant to the foregoing provisions and there are on file more than one such application for the job opening, then the Company will offer the transfer to the senior qualified employee making application."

The rate retention provision referred to in Section 10.2.3 is commonly known as "red circling."

18. In the negotiations between Albemarle Paper Company (Virginia) and the Union leading to the 1968-1971 labor agreement the Union proposed but withdrew: ". . . in

case of promotion and transfer for employees covered by this agreement to jobs within the bargaining unit, the senior qualified employee will be promoted or transferred." Albemarle Paper Company (Virginia) proposed Sections 10.2.2 and 10.2.3 which were accepted by the Union. These Sections provide seniority on transfers and carry-over of higher wage rates ("red circling") on such transfers.

19. The Union withdrew their proposals as referred in 18, *supra*. Additionally, the Union proposed but withdrew: "In the event of layoff, any qualified employee may exercise his plant seniority to any bottom level job."

20. Prior to 1958, no employment personnel tests were given to applicants for employment at the Roanoke Rapids plant. In about 1956, the then Personnel Manager, William Warren, was requested to design a personnel screening program for the use in the selection of new employees to be hired for jobs created by the installation of the new #4 Paper Machine. In this connection, Warren selected two paper and pencil tests—the Revised Beta Examination (Beta) and the Bennett Mechanical Comprehension. New employees hired for the General Extra Board and the Maintenance Department were required to score successfully on the Beta as well as have high school education.

21. In an effort to validate the Beta, Personnel Manager Warren administered this examination to a sample of employees who worked on the #3 Paper Machine, maintenance employees and possibly some employees in the Pulp Mill. The method that he followed is known by Industrial Psychologists as concurrent validation, *i.e.*, employees that were tested were then rated by their supervisors on the basis of performance on the job. As a result of this study, Warren established a cut-off score of 100 for the Beta. No

Negroes are known to have been included in Warren's sample.

22. In about 1963, the then Personnel Manager, John Bryan discontinued use of the Bennett Mechanical Tests which had been previously administered to job applicants since no positive correlation for the Bennett Test was established by Bryan's predecessor, Warren, in his studies. This occurred in the latter part of 1963 and Bryan ceased using the Bennett and initiated use of the Wonderlic, A and B series, along with the Beta Test. Since that time the two pre-employment tests, the Beta and Wonderlic, Series A and B, have been administered to applicants for Crane Operator (Wood Yard), Digester and C.E. Recovery (Pulp Mill), Paper Machine and Beater (A Paper Mill), Paper Machine and Stock Room, (B Paper Mill) Power Plant Operator (Power Plant), Boiler Operator (Boiler Room) Mill and Laboratory (Technical Services) and Finishing and Shipping Crew (B Mill Product) lines of progression.

23. The Wonderlic was selected in 1963 by Bryan, a Psychology graduate from Vanderbilt University, and Masters Degree in Public Administration from the University of North Carolina. Bryan was familiar with the Wonderlic Tests as well as other psychological tests and felt it essential for new employees to have certain verbal facilities because of the increasing technical nature of Mill operations. Bryan does not hold himself out as an expert in industrial testing; nor did the Albemarle Paper Company (Virginia) have an independent test consultant.

24. The cut-off score which was utilized for the Wonderlic A and B is eighteen (18) on either test.

25. Albemarle Paper Company (Virginia) agrees that if he were present and testifying in open court, Dr. Raymond Katzell* would testify as follows:

(a) The Wonderlic Tests are verbal tests of general mental ability. They are professionally developed tests in the process of constructing the test originally, professional considerations guided the selection of the items included and the checking out of their suitability.

(b) Some industrial psychologists believe that on written tests the average score obtained by blacks as a group are lower than the average score obtained by whites as a group. Although the reasons for this are not entirely clear, it is explained in part by the fact that blacks in many parts of the country obtain inferior schooling as compared to white, and in part by the fact that in some cultural backgrounds where blacks are not accustomed to close working relationships with whites, test scores of blacks are affected by having the test administered by white examiners. This is true not only for Negroes, but also for Mexicans, Puerto Ricans and poor whites. Although psychologists have made and are making an effort to construct cultural free tests, these efforts have not been successful so far.

(c) In his opinion, the critical factor by which a test should be judged is whether the test is valid (validity), *i.e.*, does it measure performance on the job.

---

* Dr. Katzell is Professor and Head of the Department of Psychology at NYU. Among other things he is a consultant to the Department of Labor, Office of Federal Contract Compliance on the development of testing guidelines for employers who hold contracts with the U.S. Government.

(d) In his opinion, if the test is not valid, *i.e.*, has no positive correlation with performance on the job, then the test should not be used.

(e) In his opinion, the use of ability tests without validating them is an unsound psychological practice because the tests may disqualify employees who could perform as well as employees who pass the test. The only way you can tell whether the test does this is to validate the test.

(f) There is some evidence that Albemarle Paper Company (Virginia) made an effort at validating the Beta test at the Roanoke Rapids plant, but it did not have data with respect to the job relevance of the Beta for Negro candidates as separate from white candidates.

(g) In his opinion, in determining whether a testing program conforms with sound professional practice, the psychologist should (1) perform a job analysis, (2) conduct a validation study and (3) arrive at a proper cut-off score. In conducting a job analysis, the psychologist could properly look at the requirements for the top job when functionally related jobs are combined into a line of progression.

(h) During the time that an emplyee is working on a job within a line of progression he normally would have an opportunity for on-the-job training in the job immediately above that which he is permanently assigned to during temporary periods, *e.g.*, vacations, illness, etc., which may affect his job performance ability.

(i) The Wonderlick Tests used at the Roanoke Rapids plant have not been validated for incumbent employees.

(j) The Beta Test is a non-verbal or pictorial test. It was originally developed in World War I by the Government in an effort to measure the intelligence of illiterate people.

(k) In his opinion, a significant change in the make-up of a population group tested may cause variations in the validity of a test.

(l) It cannot be assumed that the correlation between Negro test performance and job performance will be the same as that for white employees. Nor can it be assumed that there will be a difference. The only way a positive or negative correlation can be determined is to have the test validated.

(m) A validation study would also permit a company to determine whether the present cut-off scores should be raised or lowered. Such a study would "cost a not inconsiderable sum" and may not be theoretically feasible because of an inadequate sample.

(n) Both the Office of Federal contract compliance and the Equal Employment Opportunity Commission have promulgated guidelines on employment testing.

(o) The conduct of validity studies may be beneficial to business in improving its selection procedures.

26. Dr. Katzell testified that, in his opinion, the high school education requirement should also be related to performance on the job. He further stated that "general experience may frequently suggest that the people with

higher levels of education do in fact, turn out to be better performers."

27. In the 1950's Albemarle Paper Company (Virginia) started a system of utilizing class boards for the purpose of having a reservoir of employees who would be on call to staff the bottom jobs in the lines of progression. Two boards were set up—the General Extra Board and the Utility Extra Board.

28. Employees on the General Extra Board, which was used to supply the Yard Crew, Digester, C.E. Recovery, Paper Machine (A and B Mills) Finishing Crew, Shipping Crew, Boiler Operator, Power Plant, Mill, Laboratory and Maintenance lines of progression were required to have a high school education and pass the tests after those qualifications for employment were started. As of June 30, 1967, there were 62 White employees on the General Call Board and 2 Negro employees.

29. The Utility Extra Board was used to have a reservoir of employees to staff jobs in the Chipper, Service Crew, Payloader, Brakeman, First Fireman and Lead Loader lines of progression. To be hired on the Utility Extra Board, an employee was not required to have a high school education, nor required to qualify on the pre-employment tests. As of June 30, 1967, there were 50 employees on the Utility Extra Board; all of whom were Negro.

30. When a layoff occurs within a line of progression or department, the employees bump downward and the most junior employees are either laid off or offered Call Board work. Employees who are returned to the Call Board or are laid off retain their seniority rights in their former department and line of progression, but do not have a seniority preference to an opening in a different department or line of progression.

31. In 1959 the Albemarle Paper Company (Virginia) with the Union's agreement set up a formalized training program for maintenance employees which is called the Maintenance Apprenticeship Program. A committee of three Maintenance employees, selected by the Union, and three members, selected by the Maintenance Superintendent, review the Apprenticeship Program and periodically review the performance of apprentices and recommend action to the Maintenance Superintendent. Selection of applicants for the Apprenticeship Program is conducted by the Personnel Office and appropriate Maintenance supervision. Whether or not a particular person enters the program ultimately depends upon the selection by the Maintenance Superintendent. The relevant provisions of the contract pertaining to the Maintenance Program are set forth in Appendix C of the Labor contracts (Exhibits Nos. 1-4). The first Negro to enter the Apprenticeship Program entered that Program in August of 1964, and there were 4 Negroes who participated in the program through September 26, 1967.

32. In December of 1964 the Albemarle Paper (Virginia) offered incumbent Negro employees who were then working in the Chipper, Service Crew, Payloader, Brokeman, First Fireman and Lead Loader lines of progression an opportunity to take the personnel tests in order to be considered for other jobs in other lines of progression and decided to waive its high school education requirement for incumbent Negro employees who could successfully pass those tests. This offer was made a second time on November 4, 1965 and some Negro employees took the tests and were transferred.

33. Each incumbent Negro employee was given an opportunity to take the tests but some refused, including all

of the named plaintiffs in this case. A majority of those who took the tests failed them.

34. In the 1968 labor contract the Crane operator and Chipper Operator lines of progression were merged into one line of progression on the basis of rates of pay. Future promotions in this line of progression are based upon ability and job seniority of the competing employees as set forth in the current labor contract.

35. Plaintiffs Joe P. Moody, Theodore Daniels, Arthur Mitchell and Henry Hill have filed charges with the Equal Employment Opportunity Commission.

36. Plaintiffs received letters dated July 28, 1966 from the Equal Employment Opportunity Commission notifying them that they were entitled to file suit under Title VII in Federal District Court.

37. The complaint in this action was filed on August 25, 1966, or within 30 days after receipt of appropriate notice from the Equal Employment Opportunity Commission.

The foregoing Stipulations of Fact have been agreed to this 10th day of July, 1971.

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Roanoke Rapids Division
Albemarle Paper Company

and

Halifax Local No. 425
And United Papermakers & Paperworkers (AFL-CIO)

APPENDIX F TO AGREEMENT DATED SEPT. 23, 1968

WOOD YARD DEPARTMENT

Crane Operator (American)
↑
Crane Operator (Large)
↑
Long Log Operator
↑
Log Stacker Operator
↑
Small Equipment Operator
↑
Bulldozer Operator
↑
Oiler
↑
Chip Unloader
↑
Chipper Operator No. 2
↑
Chain Operator
↑
Chipper Operator No. 1
↑
Tractor Operator
↑
Chip Bin Operator
↑
Laborer (Start)

PULP MILL DEPARTMENT

Digester Operator (Cooker)
↑
Stock Room Operator
↑
Stock Room 1st Helper
↑
Stock Room 2nd Helper

C. E. Recovery Operator
↑
1st Helper No. 6
↑
*Evaporator Operator
↑
1st Helper No. 5
↑
2nd Helper
↑
Utility Helper

Caustic Operator
↑
Lime Kiln Operator

By Products Operator
↑
Lead loader-Blower
↑
Loader (Start)

*When Used

POWER PLANT DEPARTMENT

Power Plant Operator
↑
1st Helper
↑
2nd Helper (Start)

PRODUCT DEPARTMENT B MILL

FINISHING CREW

Rewinder Operator (Large)
↑
Rewinder Operator Helper (Large)
↑
Rewinder Operator (Small)

Sheeter Operator
↑
Sheeter Operator Helper

Wrapper, Tier, Capper
↑
Rewinder Plugger

Corecutter

Laborers (Start)

SHIPPING CREW

Scale Clerk
↑
Lift Truck Operator
↑
Utility Man
↑
Laborer (Start)

BOILER ROOM DEPARTMENT

Boiler Operator
↑
Bark Burner Operator
↑
First Fireman
↑
Second Fireman
↑
Laborer (Start)

A PAPER MILL DEPARTMENT

PAPER MACHINE
Line of Progression

Machine Tender No. 1
↑
Machine Tender No. 2
↑
Back Tender No. 1
↑
Back Tender No. 2
↑
Third Hand No. 1
↑
Third Hand No. 2
↑
Fourth Hand No. 1
↑
Fourth Hand No. 2
↑
Front Plugger No. 1
↑
Back Plugger No. 1
↑
Back Plugger No. 2 (Start)

BEATER ROOM
Line of Progression

Beaterman
↑
1st Helper
↑
Brokeman (Start)

B PAPER MILL DEPARTMENT

PAPER MACHINE
Line of Progression

Machine Tender
↑
Back Tender
↑
Third Hand
↑
Fourth Hand
↑
Fifth Hand
↑
Sixth Hand
↑
Seventh Hand
↑
Spare Hand No. 4 (Start)

STOCK ROOM
Line of Progression

Stock Room Operator
↑
Stock Room 1st Helper
↑
Stock Room 2nd Helper

KAMYR DEPARTMENT

Kamyr Operator
↑
Lift Truck Operator
↑
Baler
↑
Laborer

SHIPPING ROOM DEPARTMENT A MILL

Lead Loader
↑
Lift Truck Operator
↑
Lead Tier and Wrapper
↑
Wrapper, Loader, Laborer (Start)

TECHNICAL SERVICE

MILL

B Mill Shift Testman
↑
Additive Man
↑
A Mill Testman

LABORATORY

General Lab Testman
↑
General Lab Assistant

Sampleman
↑
Trainee

SERVICE DEPARTMENT

Payloader
↑
Dumpster Dumpster Operator
↑
Winch Truck Operator
↑
Truck Operator
↑
Winch Truck Operator Helper
↑
Laborer (Start)

Roanoke Rapids Division
Albemarle Paper Manufacturing Company, Inc.

and

Halifax Local No. 425
and United Papermakers and Paperworkers (AFL-CIO)

LINES OF PROGRESSION

WOOD YARD DEPARTMENT

Yard Crew

Crane Operator (Large)
↑
Long Log Operator
↑
Log Stacker Operator
↑
Small Equipment Operator
↑
Bulldozer Operator
↑
Oiler
↑
Chip Unloader
↑
Chain Operator (Start)

Chipper Operator No. 2
↑
Chipper Operator No. 1
↑
Tractor Operator
↑
Chip Bin Operator
↑
Laborer (Start)

Service Crew

Dempster-Dumpster Operator
↑
Winch Truck Operator
↑
Truck Operator
↑
Winch Truck Operator Helper
↑
Laborer (Start)

(Note 1: Should the Bulldozer operator job be discontinued the employee may move back down the line of progression according to seniority only in jobs he actually worked previously in moving up the line.)

(Note 2: The Knife Grinder is in the Wood Yard Department, but not in a line of progression.)

PULP MILL DEPARTMENT

Digester Operator (Cooker)
↑
Stock Room Operator
↑
Stock Room 1st Helper
↑
Kamyr Operator
↑
Stock Room 2nd Helper

C. E. Recovery Operator
↑
*No. 4 Recovery Operator
↑
1st Helper No. 6
↑
*Evaporator Operator
↑
1st Helper No. 5
↑
Bark Burner Operator
↑
2nd Helper
↑
By-Products Operator

Caustic Operator
↑
Lime Kiln Operator

Boiler Operator

Lead Loader-Blower
↑
Loader (Start)

(Note: Bark Boiler Operators who have not been promoted to that job from Recovery Helper will not have seniority for any other job.

Payloader
↑
*Lancer
↑
Lift Truck Operator
↑
*Salt Cake Man
↑
Laborer

*When Used

Dead End Job—Janitor

A PAPER MILL DEPARTMENT

Paper Machine
Line of Progression

Machine Tender No. 1
↑
Machine Tender No. 2
↑
Back Tender No. 1
↑
Back Tender No. 2
↑
Third Hand No. 1
↑
Third Hand No. 2
↑
Fourth Hand No. 1
↑
Fourth Hand No. 2
↑
Front Plugger No. 1
↑
Back Plugger No. 1
↑
Back Plugger No. 2 (Start)

Beater Room
Line of Progression

Beaterman
↑
1st Helper (Start)

Brokeman
↑
Laborer (Start)

Dead End Job—Janitor

B PAPER MILL DEPARTMENT

Paper Machine
Line of Progression

Machine Tender
↑
Back Tender
↑
Third Hand
↑
Fourth Hand
↑
Fifth Hand
↑
Sixth Hand
↑
Seventh Hand
↑
Spare Hand No. 4 (Start)

Stock Room
Line of Progression

Stock Room Operator
↑
Stock Room 1st Helper
↑
Stock Room 2nd Helper

Power Plant Dept.

Power Plant Operator
↑
1st Helper
↑
2nd Helper
↑
Utility Man (Start)

PRODUCT DEPARTMENT B MILL

Finishing Crew

Rewinder Operator (Large)
↑
Rewinder Operator Helper (Large)
↑
Rewinder Operator (Small)

Sheeter Operator
↑
Shester Operator Helper

Wrapper, Tier, Capper
↑
Rewinder — Plugger — Corecutter
↑
Laborers (Start)

Shipping Crew

Scale Clerk
↑
Lift Truck Operator
↑
Bander, Stenciller Weigher
↑
Elevator Operator
↑
Utility Man
↑
Laborer (Start)

BOILER ROOM DEPARTMENT

Boiler Operator
↑
Bark Burner Operator
(From Pulp Mill Section)

First Fireman
↑
Second Fireman
↑
Laborer (Start)

FINISHING ROOM DEPT. A MILL

Lead Loader
↑
Lift Truck Operator
↑
Lead Tier and Wrapper
↑
Wrapper, Loader, Laborer (Start)

TECHNICAL SERVICE DEPARTMENT

Mill
Line of Progression

B Mill Shift Testman
↑
A Mill Shift Testman
↑
Shift Testman Trainee

Laboratory
Line of Progression

General Lab. Testman
↑
General Lab. Assistant
↑
Lab. Trainee

Dead End Job—Lab. Assistant

Lines of Progression for Maintenance Department Employees will be found in the Labor Agreement booklet.

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Appendix F to Agreement dated September 10, 1965

App. 110

Roanoke Rapids Division
Albemarle Paper Manufacturing Company, Inc.

and

Halifax Local No. 425
and United Papermakers and Paperworkers (AFL-CIO)

LINES OF PROGRESSION

WOOD YARD DEPARTMENT

Yard Crew

Large Crane Operator
↑
Small Equipment Operator
↑
Bulldozer Operator
↑
Oiler
↑
Chip Unloader
↑
Chain Operator *Start*

Chipper Feeder No. 2

Chipper Feeder No. 1
↑
Tractor Driver
↑
Chip Bin Man
↑
Laborers *Start*

Service Crew

Winch Truck Driver
↑
Truck Driver
↑
Winch Truck Helper
↑
Laborers *Start*

(Note 1: Should the bulldozer operator job be discontinued the employee may move back down the line of progression according to seniority only in jobs he actually worked previously in moving up the line.)

(Note 2: The Knife Grinder is in the Wood Yard Department, but not in a line of progression.)

PULP MILL DEPARTMENT

Digester Operator
↑
Stock Room Operator
↑
Stock Room Operator 1st Helper
↑
Kamyr Operator
↑
Stock Room Operator 2nd Helper
↑
Loader Blower
↑
Loader (Start)

Recovery Operator
↑
*No. 4 Recovery Operator
↑
No. 6 Recovery 1st Helper
↑
*Evaporator Operator
↑
No. 5 Recovery 1st Helper
↑
Bark Boiler Operator
↑
Recovery 2nd Helper
↑
By-Products Operator

Caustic Operator
↑
Lime Kiln Operator

Boiler Operator

(Note: Bark Boiler Operators who have not been promoted to that job from Recovery Helper will not have seniority for any other job

Payloader
↑
Fork Lift Driver
↑
Salt Cake Man (Lancer—when used)
↑
Laborer

*When Used

Dead End Job—Janitor

A PAPER MILL DEPARTMENT

Paper Machine
Line of Progression

No. 1 Machine Tender
↑
No. 2 Machine Tender
↑
No. 1 Back Tender
↑
No. 2 Back Tender
↑
No. 1 Third Hand
↑
No. 2 Third Hand
↑
No. 1 Fourth Hand
↑
No. 2 Fourth Hand
↑
No. 1 Front Plugger
↑
No. 1 Back Plugger
↑
No. 2 Back Plugger *(Start)*

Beater Room
Line of Progression

Beaterman
↑
First Helper *(Start)*

Brokeman
↑
Laborer *(Start)*

Dead End Job—Janitor

B PAPER MILL DEPARTMENT

Paper Machine
Line of Progression

Machine Tender
↑
Back Tender
↑
Third Hand
↑
Fourth Hand
↑
Fifth Hand
↑
Sixth Hand
↑
Spare Hand *(Start)*

Stock Room
Line of Progression

Stock Room Operator
↑
Stock Room 1st Helper
↑
Stock Room 2nd Helper

PRODUCT DEPARTMENT B MILL

Finishing Crew

Large Rewinder Operator
↑
Large Rewinder Helper
↑
Small Rewinder Operator

Sheeter Operator
↑
Sheeter Helper

Wrapper, Tier, Capper
↑
Pluggers — Corecutter
↑
Laborers (Start)

Shipping Crew

Scale Clerk
↑
Lift Truck Operator
↑
Bander, Stenciller, Weigher
↑
Elevator Operator
↑
Utility Man
↑
Laborer

BOILER ROOM DEPARTMENT

Boiler Operator
↑
Bark Boiler Operator *(From Pulp Mill Section)*

First Fireman
↑
Second Fireman
↑
Laborers *(Start)*

TECHNICAL SERVICE DEPARTMENT

Mill
Line of Progression

No. 3 Shift Testman
↑
No. 1 Shift Testman
↑
Shift Testman Trainee

Laboratory
Line of Progression

General Lab. Testman
↑
General Lab. Assistant
↑
Lab. Testman Trainee

Dead End Job—Lab. Assistant

Lines of Progression for Maintenance Department Employees will be found in the Labor Agreement booklet.

FINISHING ROOM DEPT. A MILL

Lead Loader
↑
Lift Truck Driver
↑
Lead Wrapper, Lead Tier
↑
Wrapper, Loader, Laborers (Start)

App. 111

Appendix F to Agreement dated September 23, 1963

HALIFAX PAPER COMPANY, Inc.

LINES OF PROGRESSION

WOOD YARD SECTION

Yard Crew

Large Crane Operator
↑
Small Crane Operator
↑
Bulldozer Operator
↑
Oiler
↑
Chip Unloader
↑
Chain Operator
Start

Bull Gang

Winch Truck Driver
↑
Truck Driver
↑
Winch Truck Helper
↑
Laborers
Start

Chipper Feeder

Tractor Driver
↑
Chip Bin Man
↑
Laborers
Start

(Note 1. Should the bulldozer operator job be discontinued the employee may move back down the line of progression according to seniority only in jobs he actually worked previously in moving up the line.)

(Note 2. The Knife Grinder is in the Wood Yard Section but not in a line of progression.)

PULP MILL SECTION

Digester Operator
↑
Stock Room Operator
↑
Stock Room Operator 1st Helper
↑
Kamyr Operator
↑
Stock Room Operator 2nd Helper

Recovery Operator
↑
*No. 4 Recovery Operator
↑
*Evaporator Operator
↑
No. 6 Recovery 1st Helper
↑
No. 5 Recovery 1st Helper
↑
Bark Boiler Operator
↑
Recovery 2nd Helper
↑
By-Products Operator
↑
Loader-Blower
↑
Loader (Start)

Caustic Operator
↑
Lime Kiln Operator

Boiler Operator

(Note: Bark Boiler Operators who have not been promoted to that job from Recovery Helper will not have seniority for any other job. Will not go below Recovery 2nd Helper for relief or promotion to Power Boiler.)

Payloader
↑
Fork Lift Driver
↑
Salt Cake Man (Lancer—when used)
↑
Laborer

*When Used

Dead End Job—Janitor

NO. 1 PAPER MILL SECTION

Paper Machine Unit

No. 1 Machine Tender
↑
No. 2 Machine Tender
↑
No. 1 Back Tender
↑
No. 2 Back Tender
↑
No. 1 Third Hand
↑
No. 2 Third Hand
↑
No. 1 Fourth Hand
↑
No. 2 Fourth Hand
↑
No. 1 Front Plugger
↑
No. 1 Back Plugger
↑
No. 2 Back Plugger
(Start)

Beater Room Unit

Beaterman
↑
First Helper
(Start)

Brokeman
↑
Laborer
(Start)

Dead End Job—Janitor

NO. 3 PAPER MILL SECTION

Paper Machine Unit

Machine Tender
↑
Back Tender
↑
Third Hand
↑
Fourth Hand
↑
Fifth Hand
↑
Sixth Hand
↑
Spare Hand
(Start)

Stock Room Unit

Stock Room Operator
↑
Stock Room 1st Helper
↑
Stock Room 2nd Helper

PRODUCT UNIT, NO. 3 MILL

Finishing Crew

Large Rewinder Operator
↑
Large Rewinder Helper
↑
Small Rewinder Operator

Sheeter Operator
↑
Sheeter Helper

Wrapper, Tier, Capper
↑
Pluggers — Corecutter
↑
Laborers (Start)

Shipping Crew

Scale Clerk
↑
Lift Truck Operator
↑
Bander, Stenciller, Weigher
↑
Elevator Operator
↑
Utility Man
↑
Laborer

FINISHING ROOM UNIT NO. 1 MILL

Lead Loader
↑
Lift Truck Driver
↑
Lead Wrapper, Lead Tier
↑
Wrapper, Loader, Laborers (Start)

BOILER ROOM SECTION

Boiler Operator
↑
Bark Boiler Operator
(From Pulp Mill Section)

First Fireman
↑
Second Fireman
↑
Laborers
(Start)

TECHNICAL SERVICE SECTION

Mill Unit

No. 3 Shift Testman
↑
No. 1 Shift Testman
↑
Shift Testman Trainee

Laboratory Unit

General Lab. Testman
↑
General Lab. Assistant
↑
Lab. Testman Trainee

Dead End Job—Lab. Assistant (Female)

Lines of Progression for Maintenance Department Employees will be found in the Labor Agreement booklet.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILSON DIVISION

Civil Action No. 989

JOSEPH P. MOODY, ET AL.,

Plaintiffs,

VS.

ALBEMARLE PAPER COMPANY, ET AL.,

Defendants.

Proceedings before the HONORABLE F. T. DUPREE, JR., Judge, Presiding, United States District Court for the Eastern District of North Carolina, Wilson Division, Courtroom No. 1, Raleigh, North Carolina commencing at or about the hour of 9:00 o'clock a.m., Monday, July 26, 1971.

APPEARANCES:

J. LEVONNE CHAMBERS, *Attorney at Law,* Chambers, Stein, Ferguson & Lanning, Charlotte, North Carolina, and;

ROBERT BELTON, *Attorney at Law,* Chambers, Stein, Ferguson & Lanning, Charlotte, North Carolina, and; T. T. CLAYTON, *Attorney at Law,* Clayton and Ballance, Warrenton, North Carolina, appearing on behalf of Plaintiffs.

FRANCIS V. LOWDEN, JR., *Attorney at Law,* Hunton, Williams, Gay, Powell & Gibson, Richmond, Virginia, and;

PAUL M. THOMPSON, *Attorney at Law,* Hunton, Williams, Gay, Powell & Gibson, Richmond, Virginia, and;

JULIAN R. ALLSBROOK, *Attorney at Law,* Allsbrook, Benton, Knott, Allsbrook & Cranford, Roanoke Rapids, North Carolina, and;
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WARREN W. WOODS, *Attorney at Law,* Wilson, Woods & Villalon, Washington, D.C., and;

JAMES B. LEDFORD, *Attorney at Law,* Charlotte, North Carolina, appearing on behalf of Defendants.

WHEREUPON, the following proceedings were had, to wit:

COLLOQUY BETWEEN THE COURT AND COUNSEL

[11] * * *

The Court: All right, sir. Mr. Lowden?

Mr. Lowden: If the Court please, I think there are four issues here and I will address myself to them very briefly. First, the injunctive relief. The defendants believe that no injunction is warranted in this case. We believe that whatever relief they may have been entitled to some years ago we took care of in 1968, and that under the circumstances we would fight very hard not be enjoined. However, without admitting any violation of Title VII, we have concluded to say to your Honor this morning that insofar as an injunction to provide plant seniority for these people along the lines of the system that we set forth in [12] the proposed consent agreement, a copy of which I have left on your desk, we would not burden the Court today with all the evidence that we think bears on that issue. I think it's all in the depositions. And without admitting any guilt on our part, we can elimi-

nate that part of the case because we would not object to an order along those lines.

Now, with respect to the educational and testing requirements, our position is quite different. We do not believe that the *Griggs* case applies here or controls here. We think that this is an entirely different case. We think that if we have not already shown in the depositions that we will show during the trial that our testing and educational programs were instituted in an entirely different setting. We think we are going to show to the satisfaction of the Court that they were job related and are job related and that they have been [13] validated in accordance with the guidelines that are currently in effect. There is one other point. I think we have a brief in our pre-trial memorandum, and that is with respect to the Beta test. I don't think that we can assume here that the Beta test is discriminatory. I think the theory of testing is that where a test discriminates against people because of their illiteracy or their background and then is not job related, that it violates Title VII, that's the argument.

In our case, the principal test used was the Beta examination. It was developed in World War I for the purpose of determining the intelligence of illiterate people. There is no evidence, whether it is job related or not, that it discriminates against anybody because of their races or background, but only discriminates against them because of their intelligence.

We feel that our tests are valid [14] and that at no time have they been in violation of the Civil Rights Act of 1964.

With respect to back pay, here again, we do not feel that there should be any back pay. We have several reasons for stating that; I think we have them briefed in the pre-trial memorandum and I won't burden you with repeating all of those arguments now.

I would like to make a special note with respect to the issue of attorney fees. We feel that the time spent on this case, the voluminous papers that we have here, we feel that was all unnecessary. We believe that the principal facts and the operative facts that your Honor is going to take into consideration and determine in this case could have been stipulated in a matter of just a few minutes; that all of this rigamarole we've been through primarily has been just an exercise in futility, as far as I'm concerned, and we [15] don't believe that the prevailing party ought to be rewarded for that sort of activity.

* * *

The Court:

[26] * * *

Perhaps we ought to discuss some ground rules, in the conduct of the trial. The plaintiffs, I take it, will have witnesses; how many?

Mr. Belton: That is correct, your Honor. I want to raise this question because it is the same question I raised before, and that is, where do we now stand in terms of representing the people in light of the fact that July 22 has come and gone? I understand that statements were sent to the Court. we got a copy I think just this past Saturday. Also, in our further answer filed on July 10, we indicated there that there were approximately a hundred twenty-eight people who might be identified as members of the class. And it raises the question at this time, [27] where do we as counsel for the class, stand, and who are they?

The Court: Well, I think you represent the class except as to those who asked to be excused and there were very few of those. Then with respect to back pay, you also represent those who filed proper claims, and in one way or the

other there have been some eighty people who have responded to the notice, I think. So with respect to back pay, I think you represent them, too. I think they have specifically asked that you do so. So you represent the class with respect to the injunctive relief, the entire class; and such members of the class who have indicated a desire to file claims for back pay, you also represent them.

Mr. Belton: May I ask the Court another question: how does the Court propose to treat the statements contained in the further answer filed on July 10 in terms at least of the statements now appearing in that [28] document? I know that it was signed by one, only one of the named plaintiffs, Mr. Joe Moody, but we think that might be sufficient to conform with the Court's order that they be made under oath.

The Court: You are speaking in terms of a further answer that you filed?

Mr. Belton: Yes, your honor. What happened is that it's the answer that we filed with the Court in response to the Court's order that we give the specifics, and that type of thing.

The Court: Not a pleading but an answer to an interrogatory?

Mr. Belton: That is correct, your Honor.

The Court: And you want to know whether the verification of one of the parties satisfies the Court's requirement that they all sign?

Mr. Belton: Yes, sir.

The Court: I'm going to accept that verification for all.

[29] Mr. Belton: In the trial of the case, your Honor, to respond to your question, we do plan to call as many of the

seventy-eight people, or seventy-five people, that have claims as to back pay, as possible. We have asked some of them to come over and stay. Hopefully we can get to them tomorrow. In addition to these, your Honor, we do have a problem relating to several documents we'd like to introduce, those which have been identified as 9-A, 9-B and 10. We propose to put on some witnesses to testify with respect to those documents. We have, I think right now, about four of those. So we are talking roughly in the neighborhood of approximately eighty people.

The Court: Are you in position to give me your best estimate as to the time it will require you to develop your case?

Mr. Belton: We have been in a quandary because the Court did ask us to submit to the Court an estimate of the trial and it [30] would depend, your Honor, I think on how the Court is going to treat the severance issue and the severance motion. I think if the Court were to sever, we might be able to put our case on in two days, or within two days, I should say. If we are going into damages, I think we might be talking in the neighborhood of seven days.

The Court: And Mr. Lowden?

Mr. Lowden: If your Honor please, I would like to address myself to two points; I'm not sure I followed exactly what this group of some eighty people who signed a petition for back pay, we assume, your Honor is going to accept that, but we would like to note that several of the people who signed a petition for back pay, we assume, your Honor is going to accept that, but we would like to note that several of the people who signed that are deceased and we are just a little curious as to how they did that.

The Court: I'd be a little curious to see the signatures but I only meant to say, Mr. Lowden, that I would not require

these [31] seventy-three people, that I wouldn't require all to verify the claim under oath, that I would accept the verification of one of the named plaintiffs.

* * *

[153] JAMES ALFRED JONES, having been first duly sworn to tell the truth, testified as follows:

Direct Examination

Mr. Belton:

* * *

Q Are you present employed, Mr. Jones? A Part time employed.

Q And where are you employed? A Albemarle.

Q Is that the Albemarle Paper Company? A Albemarle Paper Company.

Q How long have you been employed by Albemarle Paper Company? A Employed August 11, 1952.

Q And in what position did you start in? A I went in as a laborer in the Kamyr [154] Department.

Q Could you briefly describe for the Court, Mr. Jones, the various jobs you've held at Albemarle since your initial employment, since you were first employed? A Well, I worked in the Kamyr thirteen years. The Kamyr produced pulp and we loaded it in box cars for shipment to Richmond or somewhere, they didn't sell it, I presume, it was shipped. And I worked there until the Kamyr shut down. From there they put me on the call roll and I worked in different places since then. On the digester, I've worked up there. And I've worked on the number five recovery, number five and six recovery, lancing flues.

And from there I would go different places where they

would send me whenever I was called in. Such as the paint crew, the maintenance, and also the service crew.

Q When you say that you presently work part [155] time now, what do you mean by that? A Well, just whenever they call me to work. If they call me to work today, if they see fit that they don't need me tomorrow they put me back on the board. They call whoever they want, if they would happen to call me and I'm not at home they call whoever they want the next time, which is the next man they can reach, and I might not get another call in a week or two weeks.

Q Now, I think you testified you worked in the Kamyr Department for approximately thirteen years? A Yes, sir.

Q Do you know the approximate year when that department was shut down, I think you testified? A Well, I was put on the board 1966 and they hadn't moved the machinery out at that time. We would go in there sometimes and run it, maybe one day this week, maybe two days the next week, and that would be it. It was on the way out.

[156] Q What was the race of the employees in the Kamyr Department? A You mean the people that worked in there?

Q Yes, were they white and black or just black? A All black but one, that was the operator, until they changed it to let some black operators in there; when it was almost going out they let the blacks come in and start operating it.

Q While you were in the Kamyr Department, did you ever perform any of the duties that the white operator performed? A No, I did not. I was just, whenever they would have some baling to do I would bale or maybe drive a fork lift at times, get two cents more in the hour.

Q When you were on the call board, how are you informed that you're being called to work? A When they put me on the board I wasn't [157] I was supposed to be at home, supposed to sit there and wait for a call.

Q Would they write you or telephone you or what? A Telephone me.

Q What is your educational background, Mr. Jones? A I completed the seventh grade and for the last two years I've been going to night school.

Q What school have you been going to? A Halifax Tech.

Q And what were you studying—any particular course? A Well, I'm studying reading which is American History, math and English, 2200.

Q Can you read and write now? A Yes, sir.

Q Did you ever have to do any reading and writing in the course of your work in the Kamyr Department? A No, sir.

[158] Q Have you had to do any reading and writing in the jobs that you performed while working off the call board? A No, no reading. Now, I have went to the supply room once or twice and checked out some oxygen and stuff like that. I think I did it twice.

Q What do you mean by checking out oxygen? A Well, you've got to go down there and fill out the—in other words, whoever you're working with gives you the charge number and you've got to go down there and fill out the slip and sign it in order to check it out. The record goes to the office, I reckon.

Q Mr. Jones, would you tell the Court whether there were jobs at Albemarle that you thought you were capable

of doing other than the job performed in the Kamyr Department where you worked and working on the call board? A Well, when the Kamyr was running some time they said they would have, the production [159] would be low, well, they would send me on the digester to work, to fill in, that was when it was hot before they put those evaporators up where makes those chips come down, we had to rod them down then, it as hot; and after the weather would get cool they'd send me over to number five to lance those flues when the Kamyr was down to let us make our time, to make up some time sometimes: I could have worked on the digester or either over there on number five or six or either in the maintenance where I worked off and on for the last year.

Q For the record, Mr. Jones, would you tell the Court what you mean when you refer to number four and five? A Well, that's a place, it's a large boiler. They get a certain portion of steam from that boiler and it makes a liquid that cooks the chips that's produced into paper, and that boiler, it's a big boiler that [160] makes liquid and steam, liquor and steam.

Q Have you ever requested a transfer or promotion to a job other than the Kamyr Department or off the call board since you've been there, in the last five years? A Twice. When they put me on the call board I went up there and filled out an application and I talked to Mr. Moore and I told him I wanted to fill out an application for a job, any job that come open that was regular. I didn't want the call board because I didn't think I could make it on the call board. And he said he would consider it. And later I went back and did the same thing and nothing never happened.

Q You say you put in a written transfer? A That's right. Not a transfer. I put in for, filled out an application

for a job because when they put me on the board I didn't have no job.

The Court: You just wanted some regular work rather than working on the call board? [161] A That's right.

The Court: You'd take anything if they had it? A (no answer)

Mr. Belton:

Q Now, do you see Mr. Moore in court today? A Yes, sir.

Q And he is the same man you talked to on these two occasions? That you referred to? A Yes, sir.

Q Mr. Jones, did you receive notice of the vacancies that existed in the various departments at Albemarle? A No, I did not. No, sir.

Q Did you know of any vacancies that occurred say for the last five years at Albemarle? A Not but two at the time, they were in the service crew.

Q And how did you learn of these? A Well, I happened to be working out there at the time Ed Lee retired, at the particular time. That's how I know of the vacancy [162] out there. And then I was working out there also when Clarence Powers retired and I knew there was a vacancy out there.

Q Directing your attention to the work you were doing in the paint crew, what did that job consist of? A Well, just painting. If you've got to chip down something, the paint, before you put the finishing cover on it, you just use a chipping hammer and a wire brush and clean it up before you prime it and then you go back later at a later date and paint it.

Q Have you ever seen whites perform this job? A Yes, that's the most that's in it is whites.

Q Now, do you know the department the paint crew come under? A No, sir, I really don't.

Q What kind of training have you had or did you have when you were assigned to work with the paint crew? A None whatsoever. I worked out there about, [163] I think it was three weeks, more or less, and I painted just like the rest of them. You couldn't tell my painting from nobody else's out there. It was a great big building and if anybody'd go by there and look at it if you can tell any difference you can beat me.

Q Did you ever receive any reprimands for defective work? A No, sir.

Q Now, you say that being on the call board you are subject to working on various jobs, is that correct? A Yes, sir.

Q Do you receive the same salary for the different jobs you work? A Everything except I worked in the boiler room one time unloading oil and my pay was different. That's the only time it's been different. The rest of the time it was plain laborer's pay.

Q I think you have indicated that you have [164] been on the call board since 1966, is that correct? A That's correct.

Q The one time that you worked in the boiler room— A What time was it?

Q I'm directing your attention to the time you said you worked in the boiler room, was your rate of pay higher or lower? A It was a little higher because I drew a little more

for the week, the three days I worked than I usually draw for three days.

Q Do you have an approximation, Mr. Jones, of how often you worked while you were on the call board? A How often I worked?

Q Yes, you said you worked part times, is it two days a week, three days a week or— A Up until 1970 I worked sometimes now a day a week but the year of 1970 I worked pretty good.

Q The year of 1970? [165] A Yes, sir.

Q And before that time you worked how often? A Some days one a week, some days, none a week, get holiday pay if I have a day coming up that I'm available for a call, if they call me on a holiday but if I wasn't available to come I wouldn't get it then, if I missed the call.

Q How did your income compare prior to 1966 on a yearly basis with your income between 1966 and 1970? A About $2500 difference in the year, maybe more.

Q Approximately $2500 less? A That's right.

* * *

Cross-Examination

Mr. Lowden:

* * *

[169] Q Is it not true, Mr. Jones, that in the year 1970, those were the highest earnings you ever had at Albemarle Paper Company? A Year 1970?

Q Yes. A That's right.

* * *

[173] ETHORIA JONES, having been first duly sworn to tell the truth, testified as follows:

Direct Examination

Mr. Belton:

[180] * * *

Q Would you give me your educational background? A I complete the eighth grade.

[183] * * *

Q Now, what position did this Mr. Mills hold with the Union? A He was President of the union at the time.

Q When you say union are you talking about the Halifax Local 425? A Yes, sir.

Q Do you see Mr. Mills in the courtroom today? A Yes, I see him.

Q After your conversation with Mr. Bryan, did you ask Mr. Mills to assist you in trying [184] to get these two letters clarified? A Yes, sir.

Q Did you have any conversation with Mr. Mills about the two letters on more than one occasion? A Yes, sir. The first time he said that, "you didn't take the test, they say you didn't take the test." The second time he said, "Can you give me any information as to what was on the test," said, "I might be able to check it for you." And then the next time we went into the office and he came in and they said, Mr. Bryan said, "well, we just don't have no record, I don't know how you got this notice." And that was the end of it. I didn't bother with it any more.

* * *

[187] Mr. Thompson:

Cross Examination

* * *

[188] Q And was it a black man who took your job back in 1966 then? A Yes, he was a black man.

[202] * * *

Mr. Woods:

* * *

Cross-Examination

Q Mr. Jones, when you went to Mr. Mills and asked his help in clarifying the meaning of these two letters, I believe you said Mr. Mills told you that he talked to the company about it and they reported to him that they had no record of your having taken the test at all, is that correct? A That's right.

Q And when you went to Mr. Mills you didn't [203] have the letters with you, did you? A No, I didn't have the letters with me.

Q You told Mr. Mills that you had them at home, didn't you? A I got the letter that he asked me for.

Q My question really is, Mr. Jones, did you ever show Mr. Mills the letter? A No, Mr. Bryan had it.

Q Mr. who? A Brown or Brain or whatever his name is.

Q Only to the company, you never showed it to Mr. Mills? A No, sir.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILSON DIVISION

Civil Action No. 989

JOSEPH P. MOODY, ET AL.,
Plaintiffs,
v.
ALBEMARLE PAPER COMPANY, ET AL.,
Defendants.

Proceedings before the HONORABLE F. T. DUPREE, JR., Judge, Presiding, United States District Court for the Eastern District of North Carolina, Wilson Division, Courtroom No. 1, Raleigh, North Carolina commencing at or about the hour of 9:00 o'clock a.m., July 27, 1971.

APPEARANCES:
(As heretofore noted)

* * *

[293] PHILMORE TAYLOR, having duly affirmed to tell the truth, testified as follows:

[305] * * *

Cross-Examination

Mr. Woods:
Q Mr. Taylor, you mentioned a school up at the hall—
A Yes, sir.

[306] Q Was that a school for learning how to read and write or to improve your ability in reading and writing? A That's right.

Q Did you attend the school? A That's right.

Q And was that at the union hall? A Yes, at the hall.

Q Local 425 Union Hall? A Yes, sir.

* * *

[314] MACK COY BOONE, having been first duly sworn to tell the truth, testified as follows:

Direct Examination

Mr. Chambers:

Q Would you state your name, please? A Mack Coy Boone.

[332] * * *

Cross-Examination

Mr. Woods:

Q Just a couple of questions, Mr. Boone. Workers on the call board are both black and white, are they not? A That's right.

* * *

[334] DAVID HARDING, having been first duly sworn to tell the truth, testified as follows:

Direct Examination

Mr. Belton:

Q Would you state your name, please? A My name is David Harding.

[344] * * *

Examination by the Court

The Court: Do you have the job now that you applied for or one just as good as the one you got when you first went there? A I have one just as good as when I went there.

The Court: Are you satisfied with the job you have now? A Yes, I am, if it was regular, I would.

[345] Th Court: Do you feel like these people have ever discriminated against you because you're black?

Mr. Chambers: Your Honor, with all deference, we'd like to interpose an objection.

The Court: All right. Overruled A No, I don't think so.

The Court: You don't think so? A No.

* * *

[361] JOHNNY EASTER, having been first duly sworn to tell the truth, testified as follows:

Direct Examination

Mr. Clayton:

Q What is your name, please. A Johnny Easter.

* * *

[367] Mr. Lowden:

Cross Examination

* * *

[368] Q Now, you were given a chance to go to first helper in the beater room in 1968, were you not? A Yes, sir.

Q That was a promotion, wasn't it, for you, or would have been for you? A Yes.

[369] Q And you said you didn't want to do that, didn't you? A I just wasn't available for that.

Q You couldn't do the job and you said you wanted to go back to your old job, didn't you, as brokeman? Isn't that right? A Yes, sir.

* * *

[370] Q Tell the Court how much education you have, Mr. Easter. A Second grade, not any.

* * *

IN THE UNITED STATES DISTRICT COURT

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APPEARANCES:

(As heretofore noted)

[389] * * *

[389] Mr. Belton: The next deposition, your Honor, is that of Mr. David Mills, identified as Plaintiffs' Exhibit No. 37. Mr. Mills was President of Halifax Local No. 425 when his deposition was taken on December 1967. (Deposition of David Mills identified as Plaintiffs' Exhibit No. 37, admitted in evidence.)

* * *

[Mr. Belton reading from the deposition of David Mills]

[394] * * *

"Q Is it true that the union has refused to request the company that these two lines of progression be merged? "A that is not true.

"Q Now is it true that you, during [395] "negotiations of '65, did not seek to have these lines of progression merged? "A That is not true, we did seek to have them merged.

"Q In 1965? "A In 1965.

"Q Would you state the consequence of your effort? "A We weren't able to get what we were asking for.

"Q Now would you state specifically what you were asking for? "A Well, we were asking that promotions be made first by department seniority and then by plant seniority which would have automatically done away with these two lines of progression.

"Q So that everybody in a particular department would be advanced according to seniority? "A That's right. Item number 8, union's [396] "agenda, 1965."

"Q Was this voted upon by the local? "A What do you mean, was it voted upon? Each individual item voted upon?

"Q You indicated that item number 8 in the union's proposals? "A That's right.

"Q Was submitted to the company? "A It was submitted to the company.

"Q Which requested that employees be advanced according to seniority and department? "A Seniority first by the department, and secondly by the plant.

"Q And my question is, was this particular proposal voted upon by the local union at one of its union meetings? "A No one particular proposal was voted upon.

"Q Was the overall thing voted upon? "A The overall contract was, the overall agenda, the overall contract, the [397] "package that we came out with had to be voted on in order to ratify the contract.

Mr. Belton: And Mr. Mills, continuing his explanation: "The agenda was read to the body before it, before we went into the negotiating. It was approved by the body and then after negotiation when we figured we got the best package we could get, it was again presented to the body and ratified by the membership.

* * *

"Q Now, you indicated that you presented this proposal to the company and that it was rejected? "A That's right.

[398] * * * *

"Q Now would you state why you determined not to go into it any further in trying to obtain this kind of promotion policy? "A We, as I stated before, came out with what we thought was the best possible settlement we could get short of strike, presented this, what we had come up with to the body, the union membership voted to [399] "accept it rather than to strike, and in those cases the union officers have no say-so, it is put to a vote and a majority rules.

[403] * * *

"Q Now, what did the union do to see that the employees affected by the installation of the power plant were

accorded the same kind of rights? "A To the best of my knowledge they were accorded the same kind of rights.

* * *

[414] "Q Did the union ever seek to get the company to allow the Negro employees who had the same seniority as white employees to develop education to transfer to those particular positions or lines of progression? "A I believe I stated before, I had made on our agenda that we try to eliminate the particular lines of progression and make promotions departmental first and secondly—"

Mr. Belton: ". . . by plant," it should be, and continuing the answer

"A . . . which would be in effect what you're saying.

"Q Are you stating that this would have eliminated the use of tests? "A Yes, it would."

* * *

[Mr. Woods: reading from the deposition of David Mills]

[416] "Q Now, with respect to transferring from the general call board, was it that he was just hired from the general call board or that he, how would he transfer from the general call board? "A That is something that I'm not, information that I don't have, that is handled entirely through the Personnel Department of the mill, and the union has absolutely nothing to do with this."

Mr. Woods: Being transferred from the general call board.

On page 106 through 124, he is examined extensively about the union's job steward system and he points out that there is usually a job steward from each department selected by the employees in that department. On some occasions when there is no individual who wants to be job

steward in the department the general officers of the union will act [417] as steward for that department. There are Negro job stewards.

In his reading from page 146, counsel for plaintiffs omitted the balance of an answer beginning at line 7 on page transcript 146. The line of question dealt with what does the union do to see that the employees affected by the installation of the power plant were afforded the same kind of rights. His first answer was:

"A To the best of my knowledge they were accorded the same kind of rights.

"Q Would you state how you formed that opinion?"

Mr. Woods: Mr. Belton read this part of the answer, but not the remainder of it:

"A They were reduced in force. There was no place for them, they had bumped down as low as they could go, and they were in turn put back on the call board. The same thing happened in these other lines of [418] "progression. If there was a man, the difference there being that in the power plant the lower jobs were eliminated; in the shipping department by the installation of machinery will replace the people in a higher position in the line of progression and these people had a right to bump the guys out below them, the bottom man went back on the call board or quit, as you have two of them."

The Court: He said that was true with respect to the other lines other than just the power plant?

Mr. Woods: Yes. Whenever a cut-back or curtailment occurred. In any line of progression.

Counsel also skipped pages 150 to 159. I call attention particularly to transcript page 154, line 24, dealing with the call board operation:

"Q Now, while he is on the general call board, if there are temporary [419] "positions available, is he recalled according to seniority? "A Not according to seniority, no.

"Q How is that determined? "A That is determined by the company, following his qualifications or his experience on other jobs.

"Q What if a temporary position opens up in the position he just left? "A Then the job is his.

"Q Temporarily? "A Temporarily, as long as the job runs.

"Q That is the contract that you operate under? "A Yes.

"Q And if a temporary position opens in another department? "A He can fill that position in another department and still maintain his rehiring rights on the job that he left, and that he was demoted from.

"Q Would he be recalled though to that [420] "particular department according to seniority? "A Yes, he would."

Mr. Woods: Now, counsel omitted transcript 169, beginning with line 15:

"Q Have you ever processed to arbitration the complaint or grievance of a Negro employee other than the plaintiff, Moody? "A Yes.

"Q Would you state the name of this employee? "A James Alfred Jones."

Mr. Woods: He was one of the witnesses here today.

"Q When was that? "A The last one that went to arbitration. I don't know exactly how long it's been. It's been some time this year.

"Q Was that in this year? "A Yes.

"Q You have records of that? "A Yes.

[421] "Q What was the disagreement? "A It was a dispute between him, it was a dispute between Jones and a watchman over a telephone conversation. He was given time off for not reporting as instructed and we filed a grievance on it as he was unjustly suspended.

"Q Do you know of another Negro whose complaint or grievance was processed to arbitration? "A This year.

"Q At any time. "A At any time, not that I recall, but I would like to add this, that neither has there been any white person who has gone to arbitration this year.

"Q But you have had them in years prior? "A In years prior to this time, yes. Since I have been in office, I'd say percentage-wise, most of them have been Negroes."

Mr. Woods: Counsel read most of page 180, [422] except for the bottom part. This deals with the subject of merging or eliminating lines of progression, line 7:

"Q Did the union ever seek to get the company to allow the Negro employees who had the same seniority as the white employees to develop education to transfer to those particular positions or lines of progression? "A I believe I stated before, I had made on our agenda that we'd try to eliminate the particular lines of progression and make the promotions departmental first and secondly by plant—"

Mr. Woods: I think he means by plant.

And continuing:

"A . . . which would be in effect what you're saying.

"Q Are you stating that this would have eliminated the use of tests? "A Yes, it would."

[423] Mr. Woods: And this is the omitted portion I'm reading now:

"Q As conditions—

The Court: Mr. Belton did read that.

Mr. Woods: Yes, sir, but I'm now reading what he didn't read.

The Court: All right.

Mr. Woods: "Q As conditions for employment? "A Not for conditions; we didn't have to ask for conditions for employment. We asked only for the incumbent employees . .

"Q The proposal you submitted then would have affected only those employees then in the mill at that time? "A That is true, because the union has no jurisdiction over new employees and has no say-so on who the company hires."

Mr. Woods: Mr. Belton summarized pages 181 and 182, dealing with Ethoria Jones' complaints about testing. I would like to read the [424] significant answers there; page 181, line 6:

"Q Has the local processed any grievance about the particular tests that are now used by the company? "A No, we haven't.

"Q Has the local investigated the particular tests now being used? "A We've investigated several claims about the tests.

"Q What were those claims relating to? "A Well, some, Joe, your client there, —"

Mr. Woods: Meaning your client, Joe Moody.

"A . . . is very well familiar with one of them and I could relate to you Ethoria Jones on the wood yard, in the wood yard department. He claimed that he took the test and passed it and that he was told that he took the test and passed it he would have to go back on the call board and lose all his seniority in his line of progression he was in to later get on another job."

[425] Mr. Woods: Page 182, beginning line 10, Mr. Mills, continuing:

"Jones told me that he took the test and passed it and that he was told by Mr. Jordan that in order to get into another line of progression that he would have to go back and on the call board and lose his seniority in the line of progression that he was in and that was the reason that he didn't want to go—that he wouldn't accept a job in another line of progression. This I investigated extensively. In fact, your client, Mr. Moody, was in the meeting with Mr. K. D. Running, Mr. Jim Palmer, Bob Herndon, and I don't believe I brought that out, and this subject was brought up, it was brought to the company's attention that we were under the impression that if an employee took the test that he could stay on his present job and [426] "maintain his seniority in that job until a job in the another line of progression came open and then he could transfer without being put back on the call board and the company agreed that this was right, so it was his right to do this.

"Q Did you ever determine whether Mr. Jones had the tests? "A We determined that he didn't ever take it.

"Q Did you ever check any correspondence you received in that respect? "A I have never seen any correspondence he received in reference to it, I, therefore could not have checked it.

"Q Did you talk with anyone who might have taken the test with him? "A Yes, I talked to one of the people who he said he took the test with.

"Q And who did you talk to? "A That was one of the Hardings, I've [427] "forgotten. C. I., I believe it is, his initials, C. I. Harding. C. I. I believe is his name. Now, Jones told me he took the test at the same time Harding did and Harding said he didn't."

Mr. Woods: That is all, your Honor.

The Court: All right, sir. Do the company attorneys desire to call attention to any further excerpts from Mr. Mills' testimony?

Mr. Lowden: I would just like to continue on a little with the Ethoria Jones matter. And beginning at the bottom of page 184, line 24:

"Q Now, how did you determine that Mr. Jones never took the test? "A Well, you referred a minute ago, you cut me off real quick about this correspondence. Mr. Jones told me that he took the test and passed it, and then he told me later that he went, that the company notified him that he took the wrong test and he would have to take it over. I talked to [428] "the Personnel Manager and he said no, that wasn't true, and so I reported this back to Joe, to Ethoria and to Jeremiah Webb. Jeremiah was the one who came to me with it for Ethoria. I checked it out and he came back later and told me that he had a letter from the company stating that he did take the test, that he did pass and my very words that I sent back to him was, "you bring me the letter and I'll clean that Personnel Department out." So, as of today, I have never seen the letter. I assume that he did not have the letter."

[430] * * *

The Court: All right, sir. Mr. Woods, what do you say in summary you would want the Court to find from your client's deposition?

Mr. Woods: I believe Mr. Mills' testimony establishes that the union bargained as strongly as it could to improve the system and to change the seniority system; that despite its efforts to change the departmental, the job seniority system, and provide greater protection to the more senior employees, black and white, the union body refused to make this a strike issue and consequently was unable in 1965 to make the changes that subsequently were made in 1968.

[431] I think the testimony of Mr. Mills also shows that the union investigated, sympathetically listened to and attempted to do something about all formal grievances brought to its attention whether by black or white employees.

* * *

[463] Mr. Chambers: Exhibit 41, beginning on page 95 of the deposition of Mr. Arnold B. Brown, he states that he is the representative of the Union, the International, with headquarters in Richmond, Virginia, and that he is Vice President and Legal Director or was Vice President and Legal Director;

* * *

[Mr. Woods: reading from the deposition of Arnold Brown]

[467] * * *

Mr. Woods: At transcript page 109, line 18:

"Q What was the union's position with reference to the Wonderlic test? "A We were opposing any testing at the time.

"Q Why were you opposed to any test? "A Well, we felt that what we had agreed upon under the four-year program was adequate—"

Mr. Woods: Four year program for apprentices.

"A . . . on the basis of the early agreement by someone else that had been there ahead of me.

"Q Was the test requirement instituted by the company? "A Yes."

[468] Mr. Woods: At transcript page 159, the bottom of the page, cross-examination by Mr. Lowden:

"Q Mr. Brown, looking at the lines of progression chart, during the time you were there as the International representative, during those years, does the union have anything whatever to do with who begins his employment in the classifications, chain operator, for instance, in the wood yard crew? "A Do we have anything to do with who gets the job?

"Q Yes, in the first instance? "A No, sir.

"Q Do you have anything to do with who gets the job of laborer there, to see who is first employed in that job? "A No, sir.

"Q Do you have anything to do with who gets the job in the bottom classification [469] "in any of these lines of progression? "A No, sir.

"Q Did you at any time while you were the International representative servicing this local and this contract,

either expressed or impliedly, make an agreement that any person, white or black, would get any of these starting jobs; did you agree for instance that whoever got the job of crane operator in the wood yard, either expressed or implied, would be either white or colored? "A No, sir.

"Q Did you do that for any of the starting jobs, expressed or implied? "A No, sir. Unless some employee filed a request for transfer and we felt that an employee was qualified and you have given it saw to a new [470] "hiree from outside, then we might complaint.

"Q But you would complain if you thought he was qualified, whether or not he was white or colored? "A Yes, sir.

"Q And regardless of which line of progression it was? "A That is correct.

"Q Have you ever heard of any agreement either expressed or implied, between the International, the local union down there, any agreement between them and the company that all employees say in the paper machine line of progression in the B paper mill will be white people? "A No, sir."

Mr. Woods: Skipping then to page 165, cross-examination by Mr. Ledford:

"Q Mr. Brown, you have testified that you are Vice-President—"

[471] Mr. Woods: And skipping to line 14, page 166:

"Q Now, I will ask you did Mr. Irby as International representative have the authority to require the members of local 425 either to ratify or disapprove of this particular contract? "A None at all.

"Q Do you as the Regional Director have the authority to require the members of local 425 to approve or disapprove of any particular contract? "A None at all.

"Q Is there any officer to your knowledge in the Union International that has the authority to require the membership of any local, particularly local 425, to approve or disapprove any particular contract? "A None that I know of.

"Q Do you as Vice President and Regional [472] "Director of Region No. 4 have any rights or authority to require or forbid the defendant company to establish any standards of competence or qualification in the employment of any person? "A None at all. You are talking about new employees?

"Q Yes, new employees. "A None at all.

"Q Does any member of local 425 have any such authority? "A No, they don't.

"Q Are you aware of the so-called 'right to work' laws in North Carolina? "A Yes.

"Q Do you know how long an employee is on probation without Albemarle Paper Company before they are entitled to any of the protective provisions of a contract against this charge? [473] "A It's spelled out in the labor agreement. I don't know exactly what it says but it may have been reduced or increased since I last serviced the local union. There is a period, either forty-five, sixty or ninety days —."

Mr. Woods: That is probationary period before the union can do anything with reference to that.

"Q And under which a company can discharge an em-

ployee without the union having any rights to file a grievance for such discharge? "A That is correct."

Mr. Woods: There is some further re-direct examination by Mr. Chambers and pick up again, Mr. Ledford examining on cross at page 177, line 5:

"Q I direct your attention again to Sec. 8 of the contract heretofore introduced by the plaintiffs, [474] "wherein management has reserved unto itself certain rights. Does the union have any way of reducing these rights reserved by the company except by striking? "A Only through striking and collective bargaining.

"Q If collective bargaining is not successful, would they have any alternative except to strike, I mean as a way of reducing those rights reserved by management? "A That would be the only alternative.

"Q Would you as Vice President and Director of Region 4 have the authority to direct the members of local 425 to engage in strike activities without their consent? "A No, the Constitution provides that they must vote by a secret ballot, two-thirds of the majority, before they can go on strike, and before they can go on strike they must [475] "secure the agreement of the Executive Board of which I am a member.

"Q No matter how the Executive Board might feel, it couldn't direct a strike unless and until two-thirds of the membership voted to go on a strike? "A That is correct.

"Q Is there any officer of local 425 to your knowledge who could direct that a strike be conducted unless and until two-thirds of the local membership voted to engage in such strike? "A No local officer has any union authority to direct anyone to go on strike without secret ballot of the

majority of those voting for a meeting called for that purpose."

Mr. Woods: And that concludes, your Honor, the excerpts from Mr. Brown's testimony, on the [476] basis of which I would ask your Honor to find in substance that the union exerts and has no authority to exert any control over the hiring of employees in the first instance, by the employer, or of the testing qualification procedures used by the employer in hiring employees, and that the only way the union has to change contract procedures or achieve concessions from management is through the device of collective bargaining or, in the final alternative, striking, and that a strike cannot be voted under the union's Constitution by any one except a two-thirds majority of the members of the local union by secret ballot.

* * *

[Mr. Lowden: Reading from the deposition of Arnold Brown]

[478] * * *

"Q Is it your testimony that some Negroes were questioned by the union as to their qualifications? "A Well, their argument was taken into consideration by the union in an effort to get the company to agree to assign them to some of these jobs in the new power plant. I don't know that we got to the point of saying to the company that "x" number of colored employees should be transferred to the new power plant because we didn't use colored versus white. But I do know that we discussed with these people their qualifications and with my experience in a paper mill, [479] "the people that I talked to, the colored employees were certainly

obviously not qualified to take one of these jobs in the power plant."

[503] * * *

(Deposition of Curtis V. Bullock, identified as Plaintiffs' Exhibit No. 40, admitted in evidence.)

[506] * * *

Mr. Woods: No, just to point out that Mr. Bullock ceased to be connected with the Local union in the year 1965, your Honor.

[534] * * *

Mr. Belton: At this time I would like to have marked for identification and tender Plaintiffs' Exhibit No. 32, which is the deposition of Mr. John E. Bryan, Jr., who was the Industrial Relations Manager at the plant since 1963, I believe; at the time this deposition was taken in 1967.

* * *

[Mr. Belton: Reading from the deposition of John E. Bryan, Jr.]

[555] * * *

"Q You do not have a written job description at Albemarle, is that correct? "A Not for the bargaining unit at Roanoke Rapids.

"Q Do you know whether while you were at or might have been with the company, whether there had been a job study done of the bargaining [556] "unit of jobs? "A What do you mean by job study?

"Q To determine job contents. "A I don't know that I understand your question. I don't think they have, in fact, I'm sure there hasn't been anybody studying the contents of the jobs with a view toward writing a job description or anything like that, there have been studies of what people do in terms of, by Industrial Engineers, to see whether we should install this piece of equipment or that and better improve the performance of the plant, or something like that.

* * *

[Mr. Thompson: reading from the deposition of John E. Bryan, Jr.]

[561] * * *

"Q Since the Wonderlic has been instituted, have you compared the performance of those persons in the lines, skilled lines of progression, who have not taken the Beta and the Wonderlic and do not have a high school education? "A Not in a formal study sort of way but as I said, all the reports that we [562] "get show that we are getting good people which we feel that we have a right to get in view of the fact that we are paying by far the highest wages in the area, much over and above what we would have to pay in a free, competitive labor market. Our average wage, in fact, our starting wage, is well above, I mean well above the average, probably, of this whole community."

The Court: Mr. Woods, your people are doing a good job over there, apparently.

Mr. Woods: We think we are, your Honor, for everybody.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILSON DIVISION

Civil Action No. 989

JOSEPH P. MOODY, ET AL.,
Plaintiffs,

v.

ALBEMARLE PAPER COMPANY, ET AL.,
Defendants.

Proceedings before the HONORABLE F. T. DUPREE, JR., Judge, Presiding, United States District Court for the Eastern District of North Carolina, Wilson Division, Courtroom No. 1, Raleigh, North Carolina commencing at or about the hour of 9:00 o'clock a.m., July 29, 1971.

APPEARANCES:
(As heretofore noted)

* * *

[610] ERNEST GARNER, having been first duly sworn to tell the truth, testified as follows:

* * *

Cross-Examination

[618] Mr. Lowden:
Q Mr. Garner, how far along in school did you get?
[619] A About the second grade.

* * *

[620] Q And shortly after that there was a vacancy in the next higher job, isn't that right, I believe the chip unloader? A Right.

Q And they didn't give you that job, did they- A Right.

Q They said you were not qualified, isn't that true? A They said I was not qualified, hadn't had the proper training.

* * *

[622] Q On the chip unloader job don't you have to be able to read and write? [623] A That's what they say.

Q Can you read and write? A Very little.

* * *

Cross-Examination

[624] Mr. Wood:

Q Mr. Garner, I gather that you learned to read and write at the union hall school? A That's right.

[625] Q And how long did you attend that school? A I attended right good when I first started and then I got away from it, I was working fourth shift then and I'd get some nights and sometimes I'd go in the morning when I'd get off, sometimes I'd go in the morning when I was working from three to eleven.

Q Until you went to that union hall school you couldn't read or write at all? A Well, couldn't do too much, no, I can do pretty good now.

Q And your present rate of pay as a number two chipper operator is $3.10 an hour? A Is what?

Q Your rate of pay. A Number two chipper?

The Court: Your job now, do you make $3.10 an hour? A Three-twenty-three.

Mr. Woods:

Q $3.23 an hour? A Right.

* * *

[634] WILLIE HENRY MASON, having been first duly sworn to tell the truth, testified as follows:

Direct Examination

Mr. Belton:

* * *

[643] Q Can you read or write, Mr. Mason? A Not too good.

* * *

Cross-Examination

Mr. Thompson:

* * *

[644] Q You believe you can. Now, in that type of work is it not true that they have to work with various types of manuals put [645] out by the manufacturers of different types of equipment? A Yes, but on those jobs that they have supervisors and leadmen and engineers and a lead man on every group.

* * *

[646] Q And in order to maintain this equipment you have to be able to read those manuals, don't you? A You have somebody to do that.

* * *

[648] Mr. Thompson: Your Honor, counsel for plaintiffs have indicated they would be willing to stipulate that this witness cannot read or understand—he cannot read the documents which I have identified as Company Exhibit No. 30.

The Court: Well, I thought he demonstrated a moment ago that he didn't know what they were. I got that impression. That's right, isn't it? A Yes, sir.

The Court: If I understand this witness correctly, you had a job in the maintenance department— A Yes, I did.

The Court: And they put you out of there because you are a black man? A Yes, sir, correct.

The Court: And that was nineteen years [649] ago, or thereabouts? When that happened? A '52 or '53, somewhere along there.

The Court: And you'd like to go back in there? A Yes, I would.

The Court: And if they have a job like the one that you had back then, of course, you wouldn't need any training because you already know how to do that job, don't you? A Yes, sir. Correct.

The Court: But if you went on a job that required you to read and write, you would want somebody who could read and write to explain that part of it to you? A I've worked longer than somebody come up like that, they have them all over the mill like that.

* * *

Cross-Examination

[650] Mr. Woods:

Q Mr. Mason, you said just after the Civil Rights bill was passed you went to Mr. Mills, the President of the local

union, and asked him to help you get transferred back to the maintenance department, is that right? A Yes, I did.

Q And didn't Mr. Mills go to the Personnel Manager in your behalf to try to get you transferred back there? A No, sir, I don't remember it.

Q You don't remember that? A No, sir, I don't.

[651] Q Didn't Mr. Mills tell you he would do what he could to help you? A He told me that, yes, sir.

Q As a matter of fact, the last union election, didn't you nominate Mr. Mills for president of the local? A Yes, I did that.

Q And do you hold any union office, Mr. Mason? A Well, I'm the shop steward in my bunch.

Q You're steward, shop steward? A Yes, sir.

Q Are you also a sergeant-at-arms at the union meetings? A Yes, sir, I am.

Mr. Woods: Thank you, sir.

* * *

[652] Mr. Clayton: Your Honor, we wish to designate as Plaintiffs' Exhibit No. 59 the deposition of one Theodore Daniels, dated November 1966.

* * *

[655] Mr. Lowden: [reading from the deposition of Theodore Daniels] Then on transcript page 91 he stated the only discrimination he encountered in being employed there was when we asked him to take a test, asked him if he wanted to take a test back in [656] 1964.

* * *

[708] Mr. Clayton: Your Honor, the plaintiffs now designate the Plaintiffs' Exhibit No. 60, the deposition of Henry Hill, dated November 1966. His deposition appears beginning on page 108 and continues to and including page 123.

* * *

[Mr. Thompson: Reading from the deposition of Henry Hill]

[715] "Q Did you ever do the work of the first helper? A No.

"Q Did you ever do the work the first helper was doing? A No.

"Q Did you ever do the work the beaterman was doing? [716] A No."

Mr. Thompson: I'd like also to go to page 113 where this witness testified that he could not read, and at transcript page 114 and transcript 115 where he said he was given an opportunity to take the test but declined to do so and at page 115, eight lines down:

"Q How many years of education do you have, Mr. Hill? A Not any.

Mr. Thompson: On page 123, this witness testified that in order to do the work of beetleman or helper you had to be able to read written orders.

I would like to summarize by saying that the transcript indicates that this witness' job was not being worked for a period of time and that the other jobs that were above him required qualifications that he did not have.

* * *

[717] Mr. Chambers: Your Honor, we would like to designate as Plaintiffs' Exhibit No. 61 the deposition of Mr. Arthur Mitchell.

* * *

[719] Mr. Thompson: Your Honor, have we finished with Mr. Mitchell's deposition?

With respect to this deposition, at page 129, the witness testified that he felt he had been discriminated against when the brokeman's job was closed down and he went back to the call board for a period, and then he later testified that he returned to the job of brokeman.

At page 132, in the middle of the page:

"Q Mr. Mitchell, can you read and write? A Not much.

[720] "Q Outside of yourself, do you know other Negro employees who have been discriminated against because of their race? A No, I don't."

Mr. Thompson: He was talking about himself when he went back to the call board during this period of time.

The Court: His testimony was to the effect that closing down the job of brokeman discriminated against him.

Mr. Thompson: That is correct. And the other thing at transcript page 131, he testified that his education did not go beyond the second grade.

* * *

[721] CLARENCE HIGH, having been first duly sworn to tell the truth, testified as follows:

Direct Examination

Mr. Belton:

* * *

[722] Q And what is your educational background? A Fifth grade.

Q Can you read and write? A Yes, sir.

Q Mr. High, did you take the tests that were offered at Albemarle? A Yes, sir.

Q Do you know whether you failed or passed them? A I failed the tests.

* * *

[821] Mr. Thompson: At this time, your Honor, we would like to offer the deposition of Mr. Nicholas C. Vrataric, which was taken on April 29, 1970. That is marked I believe as Company Exhibit 18. And I now would like to read some excerpts from that deposition.

(DEPOSITION OF MR. VRATARIC, identified as Defendant Company's Exhibit No. 18, received in evidence.)

Mr. Thompson: Mr. Vrataric testified that he has been associated with the paper industry for about thirty years and that this was primarily in the northern part of this country; and that he had negotiated many, many labor contracts and specifically has had specific negotiations concerning seniority in labor contracts.

* * *

[Mr. Thompson: Reading from the deposition of N. Vrataric]

[824] "Q Is the line of progression which you see in the Appendix F, B paper mill department, is that in any way unusual in your opinion? A It's not unusual.

* * *

[839] Mr. Thompson: One of the contentions of the plaintiffs in this case is that the employees could not transfer from one department to another, and so I am trying to get from this witness who is testifying that in the paper industry it is not common to transfer from one department to another; that it is very common to stay in that department in which you are initially hired. And I was just trying to show that [840] that was an industry practice and that was the purpose of the question.

The Court: Do you say the evidence of this witness in response to the question to which the objection has been interposed tends to show?

Mr. Thompson: Yes, it does.

The Court: Well, the objection is overruled, go ahead.

Mr. Thompson:

"A Well, you call it a 'penalty,' we don't call it a penalty, we call it an employee's desire to get into a new line of progression where eventually he may get to a better job. In effect it is a penalty because he is sacrificing whatever rate he had in the old department to go to the better job in the new department at the rate of the job. I might add that this does occasionally happen, especially with new [841] employees that might be hired by a company and placed in a department where the vacancy was, and then when he finds out the job opportunities in the plant, for instance if he was hired in the beater room, he might want to eventually go on

a paper machine, or he might want to go into the power plant because that is where his interests are, and then he might exercise the bidding rights to get in there but he recognizes he has to sacrifice his rate to do that.

"Q This is common in the industry? A Yes.

"Q You have negotiated with companies when the subject of transfer came up? A Yes.

"Q Is it not normally true that companies resist liberal transfer [842] provisions? A Definitely.

"Q Would you tell us why they do that? A They don't want to waste the training they have in individuals in the department he is already in, and begin giving him a complete new training program, begin him in a new training program in a new department."

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILSON DIVISION

Civil Action No. 989

JOSEPH P. MOODY, ET AL.,
Plaintiffs,

v.

ALBEMARLE PAPER COMPANY, ET AL.,
Defendants.

Proceedings before the HONORABLE F. T. DUPREE, JR., Judge, Presiding, United States District Court for the Eastern District of North Carolina, Wilson Division, Courtroom No. 1, Raleigh, North Carolina commencing at or about the hour of 9:00 o'clock a.m., July 30, 1971.

APPEARANCES:
(As heretofore noted)

* * *

[852] DR. JOSEPH TIFFIN, having been first duly sworn to tell the truth, testified as follows:

* * *

[856] Mr. Thompson:

[Direct Examination]

Q Would you state your name, please? A Joseph Tiffin.

Q Where do you reside, Dr. Tiffin? A West LaFayette, Indiana.

Q What is your profession? A Industrial psychologist.

Q Tell us where you were educated, Dr. Tiffin. A I took a bachelor's degree at South Dakota in 1927, a master's at the University of Iowa in 1928 and Ph.D. at Iowa in 1930.

Q Have you ever taught industrial psychology? [857] A Yes, I have, sir.

Q Where did you teach that? A Purdue University.

Q And for what periods of time? A Since 1938 until the present, thirty-three years.

Q Have you ever written any books in this field? A Yes, I have, sir.

Q Would you name those books, please? A I wrote an introductory text in psychology about 1939, I wrote the Industrial Psychology Text that came out in 1941, first edition, it is now in the fifth edition.

Q And have you ever done any consulting as well as academic? A Yes, I have, sir.

Q Could you briefly list some of the firms with which you have consulted? A A few of the firms with which I've had validating test study work include International Paper Company, the Meade [858] Corporation, the Marathon Paper Company, now part of American Can; Bethlehem Steel Company, Gulf States Paper Company, Longview Parker Company and the A. C. Nielson Company.

Q And have you been doing consulting work in this field of industrial psychology ever since you have been with Purdue University? A Yes, I have, sir.

Q Have you ever written any articles in addition to your books? A Yes, sir.

Q And what are they? A I've written a total of 141 articles, and this including the five editions of the book, since and during my professional career.

Mr. Thompson: I would like this marked as Company Exhibit No. 22, for identification. (Dr. Tiffin's resume identified as Company Exhibit No. 22.)

Q Dr. Tiffin, would you identify Company Exhibit No. 22? [859] A That is my vita, the story of my professional life.

Q Was that prepared at my request? A Yes, it was, sir.

Q And does the information contained on Company Exhibit No. 22 accurately reflect your professional background? A Yes, it does, sir.

Mr. Thompson: You Honor, I would like to offer Company Exhibit No. 22 into evidence as Company Exhibit No. 22.

(Dr. Tiffin's resume, identified as Company Exhibit No. 22, received in evidence.)

Mr. Thompson: I would like to point out to the Court that Exhibit 22 has been prepared to eliminate some of the preliminaries of this particular witness; it is a very extensive background; and we can just get right into the real issues in this case.

The Court: Very well.

Mr. Thompson: At this time, your Honor, I'd like to offer this witness as an expert in [860] the field of industrial psy-

chology and industrial testing and all of my subsequent questions will be based upon the Court's declaring him to be a qualified expert.

The Court: All right.

Mr. Belton: Just one question, if I may.

Q Dr. Tiffin, I was noticing from your vita sheet that you have quite a number of publications, do you know the date of your last publication? A Yes, sir. This is in two lists. The Purdue publications, through page nine, the last publication is No. 115, that was in 1971.

Q Thank you.

The Court: Very well, you may proceed.

Mr. Thompson:

Q Dr. Tiffin, are you familiar with the guidelines of the Equal Employment Opportunity Commission? A I am, sir.

[861] Q Are you also familiar with the guidelines put out by the office of Federal Contract Employment? A Yes, sir.

Q Now, when did you first become associated with the Albemarle Paper Company? A I'd say about three months ago, roughly.

Q Would you explain for what purpose you were retained? A To attempt to validate some personnel tests being used by the company.

Q Dr. Tiffin, are there various methods of trying to validate tests? A Yes, there are, sir.

Q Would you explain the various methods? A Well,

there are two basic methods, called the predictive method and the concurrent method.

Q What is the predictive method? A The predictive method, you give a test to a whole group of people who are hired and then you hire them without regard to test [862] score. And after they have been on the job for a long time you get some measure of job performance. Then you go back to correlate the score made at the time of hire; it's a long-winded method. It takes time, all kinds of time.

Q What is the concurrent method? A You go into the department at a given time, you get gradings and job performance of the employees in that department, then you ask them to come off to one side and you give them the test. And then you correlate the test score right then with success on the job. It's a much more rapid way to handle it.

Q Did you conduct a validation study at Albemarle Paper Company. A By the concurrent method.

Q What tests was Albemarle Paper Company using at this time? A Three tests, Wonderlic A, the Wonderlic B and the Beta.

[863] Q Would you briefly tell us about the Beta test and what kind of test that is? A The Beta test is a non-language culture-fair test.

Q What is the origin of that test, Dr. Tiffin? A It came out during World War I.

Q For what purpose? A To measure the mental ability of illiterates.

Q Would you briefly tell us about the Wonderlic test, Dr. Tiffin? A The Wonderlic was developed by E. F. Wonderlic based largely upon the Otis self-administered test

of mental ability. There are five forms of that test. It is a very widely used test.

Q You say it's widely used, does that mean in the industry it's used frequently? A What's that again, sir?

Q You stated it is a widely used test, are there many companies that use the Wonderlic? A A great many, that's right.

[864] Q When you proceed to conduct a validation study for Albemarle, when you started this study, will you describe how you went about it, the mechanics of working out a concurrent validation study? A Well, we looked over the various progression lines.

Q Do you have a copy of those lines of progression with you A Yes, I do.

Mr. Thompson: I would like to have this marked as Company Exhibit No. 3 for identification, the validation study.
(Validation Study identified as Company Exhibit No. 3.)

Mr. Thompson:

Q Dr. Tiffin, do you have a copy of those lines of progression before you? A I do, sir.

Q And you also have a copy of your validation study? A Yes, sir, I do.

[865] Mr. Thompson: For the information of the Court, your Honor, the lines of progression are attached to the joint exhibit and he's going to refer to both the lines of progression and the validation study.

Mr. Lowden: Does the Court have a copy of the lines of progression before it?

The Court: That is attached to the stipulations of fact.

Mr. Lowden: I think you will find it easier just to have this.

The Court: I will, and thank you very much.

Mr. Thompson:

Q Dr. Tiffin, I believe you stated that you used the concurrent method of validation? A Yes, sir.

Q Now, looking at the lines of progression, would you explain how you went about conducting the validation study? A Well, we took small groups of people at about the same job level in the progression line and those men were then rated by [866] their supervisor in overall job performance, the ratings being made on job performance only, not personality, not attitude, those things were avoided in making the rating; these tests are not supposed to measure a guy's attitude, they measure his background information and skill for the job. So we took these groups, the first ones I think were the caustic operators and the lye kiln operators, and they were rated by their supervisors; two ratings for each man, incidentally, average of two ratings as a measure of job performance.

Q You say two ratings, would that be Carey versus Bob and Bob versus Jim? A No, there are two different raters, two different supervisors.

Q All right, go ahead and explain how you grouped the jobs. A Then the next group we took was the pulp mill department, recovery operator, [867] first helper; those were considered to be jobs of about the same skill level.

Q Now, I notice, Dr. Tiffin, on Company Exhibit 3, the validation study, you took some of these jobs from the top of the lines, would you explain why you did that? A What's that again, sir?

Q I notice in your study that some of the jobs which you ran the study on were toward top of the line of progression, would you explain why you did that? A Because those are the jobs to which these men will go if they stay in the progression line long enough, and both the EEOC guidelines and the OFCC guidelines make a test not against entry jobs but against jobs above the entry level, assuming that within a reasonable period of time the men will move into these jobs.

Q Now, did you have a meeting then with Mr. Moore to decide how you were going to proceed? [868] A I did, sir.

Q And would you tell the Court what you told Mr. Moore to do in conducting these tests? A I asked him to spot a group of men in each of these progression lines and have them rated by their supervisors and send me those ratings.

Q Were those ratings sent to you? A They were, sir.

Q And where were they sent? A At Purdue University.

Q Were test scores also sent to you? A Yes, sir.

Q Where were they sent? A Same place.

Q Do you know, Dr. Tiffin, whether some of these people had to be tested for the first time? A I think a few of them had been, they were calling for overtime to help us test the test.

Q Now, when you received the test scores [869] and the ratings at Purdue University, would you tell us what you did then? A I ran a correlation between the test scores of the men and the job performance rating for the men in each group.

Q And was this a mathematical formula that you used? A Yes, we used what's called P co-efficient.

Q What is the P co-efficient? A It gives an index or measure of the relationship between two variables, in this case the test score was one variable and job performance rating was the other variable.

Q Now, is Company Exhibit No. 3 the written report that you prepared after you had done this? A It is, sir.

Q Is this an accurate report based upon the information that you have? A Yes, it is, sir.

Q Now, I'd like you to look at page one of [870] Company Exhibit No. 3. Does the Court have a copy?

The Court: Yes, I think so. A I forgot to date it. July 16th is the date. I had to write it in ink.

Mr. Thompson:

Q July 16th is the date? A Yes.

Q Do you have a copy of the report? A The judge has it now.

Q Looking at page 1 of Company Exhibit No. 3, I notice you have certain asterisks there, one and two, would you explain what these asterisks mean? A Well, when a correlation is computed between two variables, it could happen by chance; if the correlation could occur by chance alone only one time in a hundred, I have two asterisks; if five times in a hundred, one time in twenty, one asterisk, and one chance in twenty, it couldn't have occurred by chance alone.

[871] Q Proceeding to page 2 of your report, looking at the column on the right, you have the letter "N" at the top of the page, would you explain what that column means? A Page 2?

Q Page 2 of your report, looking at the top of the page on the right hand side, the capital letter "N", what do those numbers underneath mean? A I don't see that, sir.

The Court: The column heading on page 2, the first one following the job group. A Yes, "N" means the number of employees in the test.

Mr. Thompson:

Q That is the number of employees that were in that sample? A In that sample, yes.

Q Going to the next column, you have the word "Beta." A Yes.

Q Does that stand for Beta test? [872] A That's correct.

Q And Wonderlic A and the next one is Wonderlic B? A Right.

Q There are ten groupings on page 2? A That's right.

Q Did you find a positive correlation for all the groupings or how many did you find? A All but one, nine out of ten.

Q Which group did you not find a positive correlation? A The "B" paper mill, stockroom operator, stockroom first helper; none of the tests correlated significantly to test the people in those jobs. That's the only one that failed.

Q Now, going to page 3 of your report, Dr. Tiffin, you have a chart there, and the first one pertains to the Wonderlic A, I believe, job group number one, Test Wonderlic A? A That's right.

[873] Q Looking at the chart, going over to the left hand side, twenty-three or above and then on the right hand

side it has 100, would you explain what that means in that chart? A Well, I followed the advice in the guidelines to present the result in statistical and also graphic form. These charts are the graphic form of the result. That is known as an expectancy chart. This chart shows that for men in the caustic operator and lye kiln operator, the man who has a score of 23 or above, 100 percent were superior; those scoring 21 to 22—ninety-nine percent superior; those scoring only 8 to 15, only one percent were superior. This is a graphic representation of what that correlation means.

Q Going to pages 4, 5, 6, and 7, you have similar charts? A That's right.

Q Would the explanation you just made apply [874] to those charts? A Exactly.

Q Dr. Tiffin, I would like for you to turn to page 8 of the validation study. I notice on page 8 of the study you say that you recommend a score of 103 on the Beta, would you explain that recommendation? A We look back now to page 4, the chart for recovery operator, first helper and we note that the score 106 or above, 106 to 109, 76 percent is superior. If the score is below 106 a smaller percent is superior. So it seemed reasonable in the light of that chart to say that 103 in the Beta is a very minimal score. Let's look at the middle third of that test. Those who scored 103 to 105, sixty percent is superior. And I felt that 103 was a very reasonable minimum score to require of that test, for that operator.

Q All right. Dr. Tiffin, looking at page 8 of your report again, I notice that you [875] recommended a minimum score of 17 on the Wonderlic A? A Correct.

Q Would you explain that recommendation, please, to the Court. A Well, if we glance here at the chart for

Wonderlic A, it's graphed out, we find that 17 is about as far as you could reasonably go and still expect a reasonable number of superior people. That is an overall generalization of all the charts of the Wonderlic A.

Q Dr. Tiffin, I notice that your summary here on page 8 of your report says nothing about the Wonderlic B, would you explain why nothing is said about the Wonderlic B in your general summary? A Because the Wonderlic A came through just a little better on average than the Wonderlic B, it's the same kind of test and I felt the Wonderlic A would be all you'd need. We don't need the Wonderlic B.

[876] Q Looking again, Dr. Tiffin, at page 2 of your report, I notice you have the three tests, the Beta, the Wonderlic A and the Wonderlic B; I notice that not every test is validated for every job group. A That's right.

Q Would you explain why that occurs? A Well, no test or no set of tests will validate for all jobs. In this case we are very fortunate to find that one or more of these tests validated for nine of the ten job groups. But one group failed. Group 6, "B" paper mill, stockroom operator and stockroom first helper. No one of the tests validated for that group of jobs. So there is no chart for that group.

Q Now, based upon your study, Dr. Tiffin, did you recommend that the company utilize these tests for its initial hiring? A I did, sir.

Q And why did you make that recommendation? [877] A Because as the men are hired, in the labor pool or whatever it is, then they are finally put in a progression line, and if they make scores of 103 or better on the Beta test, and 17 or higher on the Wonderlic A, they can go to any of these progression lines and get along pretty well, if they don't, they can't.

Q Dr. Tiffin, are you familiar with the standard for educational and psychological testing manual? A Yes, I am, sir.

Q And what is that manual, Dr. Tiffin? A That manual gives the details of how to go about validating tests and using tests, it is a very comprehensive document.

Q Is that a classic in the industry, so to speak? A In the psychology profession, yes, it is.

Q Did your study which you conducted for Albemarle Paper Company, did you follow the principles set forth in that manual? [878] A A hundred percent, I did. I wouldn't dare not to, wouldn't want to.

Q Dr. Tiffin, with respect to the Wonderlic A and B and the Beta, I'd like to ask you one question and that is the origin of these tests themselves, in your professional opinion are they profesionally developed tests? A They are, sir.

* * *

[881] Q Dr. Tiffin, in your professional opinion is the Beta a professionally developed test? A Yes, sir.

Q Is the Wonderlic, A and B, a professionally developed test? A They are, sir.

[882] Mr. Thompson: Your Honor, at this time, I would like to offer Company Exhibit No. 3 for identification which is the validation study of Dr. Tiffin into evidence as Company Exhibit No. 3.

Mr. Belton: We object, your Honor, until we have opportunity to cross-examine the witness.

The Court: I will receive it at this time and if you are able to modify or destroy it by way of cross-examination, of course, that will be given effect, too.

(Validation Study, Defendant Company Exhibit No. 3, admitted in evidence.)

Mr. Thompson:

Q Dr. Tiffin, I believe you also stated you were familiar with the EEOC guidelines? A Yes, sir.

Q Are these tests which we just mentioned professionally developed in your professional opinion —

Objection:

[883] Q —within the meaning of those guidelines?

Objection: Overruled

A Yes.

Q Dr. Tiffin, have you ever been through any paper mills? A Yes, I have, sir.

Q Have you ever been through the mill at Roanoke Rapids? A Yes, sir.

Q And you have been through some other mills as well? A Many other paper mills.

Q Did you have occasion to go through the mill down at Roanoke Rapids within the last few months? A I have, sir.

[892] Mr. Belton: Cross-Examination

Q Dr. Tiffin, could we get the names of the persons who worked with you in the studies that have been identified as Exhibit No. 3? A What is that again, sir?

Q The names of the persons who worked with you in the study identified as Exhibit No. 3, the validation study? A Mr. Moore.

Q Was he the only person? A Yes.

Q Would you tell us how long you spent at the plant when you visited the plant in Roanoke Rapids? A About a half day.

Q In preparing your study did you have written job descriptions? A No.

Q May I ask you, Dr. Tiffin, you have before you I think the lines of progression? A I do, sir.

[893] Q Could you tell us how you got the description of the work performed for the various jobs that you did do the study on? A Well, we took the jobs more or less adjacent in each progression line so that the skills were pretty similar, one to another. Put men on those jobs for the course of each study.

Q Turning to page 2 of the study, the ten jobs that you have listed there— A The ten groups of jobs.

Q — ten groups of jobs that you have listed there, were the only jobs that you considered in your study, is that correct? A That is correct.

Q I take it you took a tour of the plant while you were there at Roanoke Rapids? A Yes.

Q Dr. Tiffin, I think there is a term used in your profession called criterion, is that correct? A That's correct.

[894] Q Could you explain to the Court what that means? A That means measure of job performance. We avoid using the word where we can, but measure of job performance is more meaningful.

Q Measure of job performance? A Measure of job performance, job success, job performance, how well is the man doing the job, that's the criterion.

Q Could you tell us what measures of job performance you used in your studies? A Supervisory ratings of overall job performance. Excluding a man's attitude, just how well the guy can do the job when he's feeling right.

Q Did you talk to any supervisors while you were down there? A No, I didn't.

Q I think you referred to the fact that you had certain manuals used in various jobs, is that correct? [895] A That is correct.

Q Now, could you tell us who selected those manuals for you? A Well, Mr. Moore gave me a great, big stack of the manuals. I just picked out a couple at random.

Q While you were there on the visit? A Yes, that's right.

Q Referring to page 2 of the study, Dr. Tiffin, I note that you have eight people in the group, caustic operator, line kiln operator, A That's right.

Q Do you know, Dr. Tiffin, whether or not that included all of the people who were employees in these two categories? A I don't know for sure but I think that probably was all of them.

Q About all? A Yes.

Q Would that be true for each of the groupings that you have on page 2? A Well, not necessarily. Because that is the [896] majority in each of those groups.

Q Now, assuming that all in the group were not included, who made the selection of the individuals from the particular groups? A Mr. Moore.

Q Do you know of your own information, Dr. Tiffin, the

basis on which Mr. Moore made his selection of these individuals to be tested? A I didn't hear you, sir.

Q Do you know of your own information the basis of the standards used by Mr. Moore in the selection of these individuals in the various groups if all were not selected to be tested? A No, I don't know.

The Court: Do you know if any of those selected had been previously tested?

A I think a few of them had, your Honor.

The Court: You said that before?

A Yes, sir.

[897] Mr. Belton:

Q Do you know who administered the tests to the testees in the study? A Mr. Moore, I assume, or one of his employees.

Q You don't know of your own personal information who administered them? A No.

Q Did you discuss with Mr. Moore the circumstances under which the tests should be administered? A I said to follow the manual of the test. The manual tells how to give a test, how long to allow, what equipment to have available, the manual of the test tells exactly how it is to be given. So that everybody gets exactly the same chance. I'm sure the tests were given under that standard of procedure.

Mr. Chambers: Move to strike that as an conclusion.

The Court: Well, I don't see how I could [898] consider it, he just says he's sure it was but he has no way of knowing. Go ahead.

Mr. Belton: All right, your Honor.

The Court: Wait a minute. Maybe you might have some way of knowing. Why do you say that?

A I'm just assuming that Mr. Moore would follow the procedure in giving tests, part of his job.

The Court: Well, Mr. Moore is going to come back on the stand. We'll find out about that.

Mr. Belton:

Q Dr. Tiffin, could you describe the precautions taken to avoid contamination of the measure of performance by knowledge of the information contained in the tests? A I'm sorry.

Q I said will you tell the steps that were taken to avoid contamination of the criterion or measure of job performance by knowledge of the job content, test content, I should [899] say? A Well, the rater had no idea about the test scores these men made. We never let a rater know what a test score is when he rates him. If you believe in the test you rate him high, if not you rate him low. As a fundamental principle, never does a rater know a test score at all about the men they're rating on job performance. I'm sure the men didn't know the test scores.

Q Do you know of your own personal knowledge whether or not they knew these test scores? A No, I didn't go and watch over somebody's shoulder.

Q Dr. Tiffin, did you have information on the various testees such as age, race, sex? A I did, sir.

Q Do you know how many black persons were included in the study? A I don't know. I know some, I don't know how many.

[900] Q Were you sent information, I take it you were sent information as to these kinds of things, the names of the persons, his age, his race, sex— A Not his race, no.

Q Were cut-off scores used by the company prior to your study? A (no answer)

Q I think you established a score of 17 for the Wonderlic A, and 103 for the Beta, is that correct? A I recommend those.

Q Recommended those. Prior to your recommendation and prior to the time you recommended them were you aware they were using other scores, cut-off scores, for these tests? A I was not aware of that. I might say that they couldn't have been using very high scores because some of these guys tested very low, as low as 8 in the Wonderlic test, and as low as 95 in the Beta. They couldn't have been using very [901] high cut-off scores or they wouldn't have these low testing employees.

Q I think you said you established a cut-off score, recommended a cut-off score of 103 on the Beta and a score of 17 on the Wonderlic A, is that correct? A That's correct.

Q Is it your understanding that employees or applicants if the company followed your recommendation, that they take both tests? A Yes.

Q Dr. Tiffin, I note that in most of the job groupings that you have taken the highest job positions or the highest job positions included among the group, is that correct? A Not the real highest, from the middle on up.

Q Could we go through this listing, the seniority roster, please, I mean the lines of progression. A Yes, I have it here.

Q Now, in the pulp mill department, you have the caustic operator and the line kiln [902] operator, is that correct? A That is correct. Eight employees.

Q Eight employees. Is it your testimony that you used the same test scores for the digester operator position, that is not included in that job group? A No.

Mr. Thompson: I'm going to object to that because I think, I don't understand the question and I think it's misleading.

The Court: All right, let's let him re-state his question and see if you can understand it and maybe you will withdraw your objection.

Mr. Belton:

Q I note that you have the caustic operator and the line kiln operator in the first group? A Job group one.

Q And looking at the lines of progression, they have a category, the first branch of the line is digest operator at the top, just reading across the top of the page, Dr. [903] Tiffin, directing your attention to the top of the page, I'm asking you would you expect the company to use the same cut-off score for that position? A I would.

Q The digester operator position, is that correct? A That's right.

Q Let me ask you this question: would you expect for all the lines of progression as shown on the lines of progression for the various departments, the various lines of progression in the various departments, to use the same cut-off scores? A These were minimal cut-off scores for all those lines.

Q For all those lines. That would include the shipping room, department "A" mill? A That's right. All the job groups on page 2 of my report. Except the one that the test didn't come through.

The Court: Number six.

[904] A Number six, correct.

Mr. Thompson: I'm going to have to object to the question because I think that's an incorrect assumption. And that is there are certain jobs here we were not testing for and that were not included in this report here and I think that the question assumed there was a test on everything on all lines of progression.

Mr. Belton: Your Honor, I'm just trying to find out what the validation study report covers, since all jobs are not covered I asked him whether or not he expected the cut-off score he recommended to be used for all lines of progression even though they were not covered by the report.

The Court: He has answered that question, has he not?

Mr. Belton: I don't think he has answered.

The Court: Did you answer that question?

A What was your question again, sir?

[905] Mr. Belton:

Q Let me back up, Dr. Tiffin. You did not include all jobs in your report, is that correct? Or study all jobs in your report? A That is correct.

Q The question I am putting to you now: do you expect the recommended cut-off scores to be used for all lines of progression in all departments? A No, only in those we studied, the nine job groups.

The Court: You actually studied ten groups and you're omitting one because it didn't work out? A That's right.

The Court: Go ahead.

Mr. Belton:

Q Did you make a study, Dr. Tiffin, of the reliability of the measure of performance? A No, I didn't do that.

Q Dr. Tiffin, you indicated I believe that Mr. Moore made available to you certain [906] manuals? A Yes, he did.

Q Did he then go through and sort of explain to you what manuals were used for what jobs? A Yes, he did.

Q Did he tell you what jobs these two manuals were used for? A Yes, he did.

Q On what basis did you determine, Dr. Tiffin, did you determine that these two manuals were actually used by the persons in the job, was it based on your conversation with Mr. Moore? A Yes, it was.

Q Returning to the validation study, Dr. Tiffin, I notice that you do have approximately ten charts, is that correct? A Ten what?

Q You have ten charts. A Nine charts. Six is missing because the test didn't come through in job group six. You never make up a chart unless the test [908] comes through. Except on the conference level.

Q I think you testified, Dr. Tiffin, that it's almost impossible to validate the requirement of high school education? A Not impossible but practically impossible. Very impractical, completely so.

Q If you were to attempt to validate it, the high school

requirement, in what way would you do it? A I'm sorry, sir.

Q If you were to attempt to validate the high school requirement, how would you go about doing it? A I mentioned that awhile ago in the direct examination. The only way to do it would be to hire a whole bunch of men with and without high school educations. Put them all on their jobs, and wait, oh, six months, a year, maybe two or three years, and then get ratings of job performance, and if those without high [909] school educations did not do as well as those with high school educations then you've got a validation of that department; that's the only way in the world to do it scientifically. But it's a long-winded, expensive, time-consuming proposition. That's the way to do it, the only way.

Q Realizing the difficulty of validating a high school education, do you have an opinion as to whether or not it should be used as a criteria for employment or promotion? A I do on the grounds of these things that the people must read. It's written in such a difficult way that you've got to have at least a high school education to understand it. There is an indirect way to validate that requirement. Indirect but better than nothing. Not very precise. These materials I first counted came out with very difficult reading indexes and you've got to have a high school education [910] to read the darn things.

Q The data that you got on the testees, you did have an educational background, is that correct? A No, I didn't have an educational background. Didn't have it at all, didn't use it, didn't have it. The test scores against job success, the correlations were.

Q Dr. Tiffin, do you know whether or not there are some people at the plant that do not have high school educations? A I do.

Q Dr. Tiffin, do you think the race of the individual might affect a validation study of the testees? A Race might affect it?

Q Yes. A Only to the extent that men of a certain race might not have had the background, educational background, but the test is not discriminatory by race at all. It discriminates against those who don't have [911] the background to do the work, to take the job.

Q When you say background, is it the ability to pass the test or the ability to do the job? A The ability to pass the test in the validation instance, yes. But these studies show clearly that if you don't have these minimal scores you're not going to be able to do the job very well. That's not discrimination as I see it at all.

Q I wasn't asking you about that, I was asking you whether or not the race of the individual might affect his performance on the job, given a situation where he doesn't do as well on a job say as a white compared to a black? A I can't answer that question, sir.

Q Are you aware of the studies in the profession that are attempting to research this question? A Yes.

[912] Q Have you read any of these studies? A Yes, a few.

Q Do you have an opinion as to the approach that has been taken with respect to these studies as they try to focus in on this question? A Yes, I have an opinion. If a company is using a test with no validation of that test, and there are some big companies that are doing that very thing,

they've been courting trouble, but that's a mental test that minority groups score low on, but there's no validation of the test at all. But they're using this anyway. Now, that's out and out discriminatory. There is no relation to job success, but the black people score low on that test so using that test is discriminatory. And I'd be the last guy in the world to recommend that a company do a thing like that. It would be terrible. It's known as bad business.

The Court: And productive of lawsuits.

A That's right.

[913] Mr. Belton:

Q Doctor, I am trying to understand your answer to that, and correct if I'm wrong, you are saying that if a company uses a test that is not validated and that black persons do less well than whites— A Out and out discrimination.

Q No, I'm not asking about discrimination, I'm talking about validity. Let me pose a hypothetical to you: if a company uses a test that is not validated and black persons do less well on the test than whites, yet they perform equally as well as whites on the job, how could this affect the validity of the test, can you follow my question, Dr. Tiffin? A Yes, I think I can. And there would be no validity to the test. There is no correlation at all between job performance and test scores and you'd drop that test like a red hot potato.

Q Doctor, I believe you said you did not know [914] the race of the individuals in this group? A No.

Q Did you ask for this information about race? A No.

Q Is there any reason why you didn't ask for it? A I wanted to validate the tests, pure and simple, without regard to race, creed or color.

Q A moment ago, I was asking you about it, the hypothetical that I posed to you, would this be a pertinent consideration for validation? A I think it would not be, no.

Q You are aware that the profession recognizes that as a general rule, blacks do less well on written tests? A Yes, I am very much aware of it.

Q But it wouldn't make any difference in your studies? A (Witness shakes head negatively.)

[915] Q Your study did not include validation of all the jobs, is that correct? A That is correct.

* * *

[919] Edward C. Moore, Jr., [having previously been duly sworn to tell the truth] re-called, testified as follows:

Mr. Thompson: Direct Examination

Q Would you state your name, please. A Edward C. Moore, Jr.

Q Are you the same Mr. Moore who previously testified in this case? A I am.

Q Do you have a copy of Company Exhibit No. 3 before you, Mr. Moore? A No, I don't.

Q Mr. Moore, do you know Dr. Joseph Tiffin? A I do.

Q Did you work with him in conducting a validation study at your mill? A Yes, sir.

Q Approximately when did you first meet Dr. Tiffin, Mr. Moore? A It was either April or May.

Q Sir, did he explain to you the mechanics of conducting a validation study? A He did.

[920] Q Would you briefly explain how you went about conducting the study? A We, in looking at the mill, were interested in validating the tests in the departments that we had considered skilled classifications and had previously tested and as such we took a number of job classifications in groups both from the top of the progressions and the middle of the progressions in those departments, the jobs having like responsibilities or fitting into the other higher classification responsibilities.

Q Going to page 2 of Company Exhibit 3, column one, under the letter "N", there are eight people who participated in that study, according to this report, now would you tell the Court how these people were selected in these job classifications? A These are the eight caustic operations in the lime kiln operators.

Q That's all you have? [921] A That's right.

Q How about the next column going down? A This is the same.

Q Did you make an effort to get every employee who held these permanent jobs to participate in the validation study? A Yes, we did.

Q You tried to get every one? A Yes, to the point that we even tried to accommodate them if it was inconvenient for them, to schedule them at other times to take the test if they had not taken the test previously.

Q Now, looking at all these various job groups, to your recollection were there any employees who refused or declined to participate in the validation study? A There were.

Q Do you recall the names of any of those individuals? A Mr. Ernest Garner, Mr. Joe H. Moody.

Q Do you recall the race of those individuals? [922] A Both Negro.

Q To your knowledge, Mr. Moore, were there any Negro incumbent employees in these groups who did participate? A There were.

Q Do you recall about how many Negroes participated in the validation study? A I believe there were four additional ones, I don't know that I can give you all the names.

Q Would you explain the method that you utilized in having the supervisor rate the employees who were involved in the study? A We received some material from Dr. Tiffin which were little forms and you placed each employee's name on one side of the ticket and another employee's name on the opposite side of the ticket and each employee was rated against every other person within that group or classification. We then brought the supervisors, I personally instructed them to take these tickets, one [923] at a time, look at them, determine which ones they felt irrespective of the job that they were actually doing, but in their respective jobs, did a better job than the person they were rating against, and to go through this process in its entirety in each of the classifications that they were concerned with.

Q Now, did the supervisors who actually did the rating, have the test scores of the people in front of them at the time of this? A They never saw the test scores.

Q After you obtained the test scores and the ratings did you transmit them to someone? A Yes, sir.

Q To whom did you send them? A Dr. Tiffin.

Q I believe you testified that Ernest Garner declined to participate in the study? A Correct.

[924] Q Did he give you any reason for this? A No, he didn't give any specific reason.

Q Did we compel any of the employees who held the incumbent jobs in the jobs that were studied to participate, to take the test? A No, sir.

Q Where were the actual tests administered, Mr. Moore?

A In the personnel conference room at Roanoke Rapids.

Q I believe you testified that another Negro emlpoyee declined to participate in the validation study —

The Court: Joseph H. Moody, he said.

Mr. Thompson: This individual's middle initial was not "P"? A That's right.

Q That's a different Moody than the plaintiff in this case? A That is a different Moody, I don't even know if they are related.

[925] The Court: The plaintiff in this case was not working there in April of this year.

Mr. Thompson: That is the point I was trying to clarify, your Honor. No further questions.

Mr. Belton: Cross-Examination

Q At the time that the tests were given for the study, were the tests given to all the testees at a time, at one time? A No.

Q Do you know how it was divided up? A Well, our facility was very restricted so we could only I think accommodate something in the neighborhood of around I think eighteen at the most at one time.

Q Now, were all three tests administered at one sitting? A They were.

Q Now, the testees, do you have some appreciation, Mr. Moore, of how long each of them had been in the respective job [926] such as caustic operator, lime kiln operator, prior to the time the studies were taken underway? A No, we wern't concerned with seniority.

Q I said do you have any appreciation of that, apart from whether it was determinative or not. A Well, I have appreciation that there were old employees and new employees if that's your question.

Q Do you know whether all the testees had a high school education? A I'm sure there were some who do not.

Q Now, did you see the test scores, Mr. Moore? A Did I see them?

Q Yes. A Yes.

Q You say you didn't administer the tests, but who did? A One of my assistants, Mr. John Burgwyn.

Q Do you know whether he had administered [927] these tests before? A Yes, he has.

Q Would you have any idea as to how often? A Mr. Burgwyn joined my staff I believe in 1967, that was one of his primary responsibilities, was the employment of our employees in the mill and at that time we were giving these tests, so since 1967 through 1971 he has, upon many occasions, had the opportunity to administer these tests.

Q I believe you testified, Mr. Moore, that you tried to get each employee in each of the job categories to partici-

pate in the study and that some refused and I think you gave the names of these two blacks; do you know of the total number you tried to get both black and white, how many refused to participate in the validation study? A Those were the only two.

Q Only two blacks refused to participate? [928] A That is correct.

Q Would you tell us, Mr. Moore, what standard you used for selecting the black participants in the study? A By the fact of the job that they were working.

Q And that would be, if you recall, look at page 2 of the report — A Yes.

Q Would you know what job that was? A Groups Number 2, Groups Number 3, Groups Number 4.

Q This for black employees now? A Yes, sir. Groups Number 6; no, that is incorrect; Number 7, Number 8.

Q Let me see if I can clarify this, Mr. Moore, you said you did have approximately four blacks participating, right? A Well, when I look at these job classifications I think it may have been a little higher, I don't know. There were possibly more than four.

[929] Q I think you testified that Mr. Burgwyn administered the tests, is that correct? A That's correct.

Q Do you know who scored the tests? A I believe he did.

Q Now, in getting the supervisor's rating, did you do this on an individual basis with each supervisor or did you do it as a group? A No, we brought, for each department we brought the supervisors in and we put one supervisor in one

room and another supervisor in another room, in other words, we separated them. And I had a discussion with them prior to their doing this preferential rating. I wanted to make certain that this was entirely, as nearly as possible, an objective determination.

Q I think you also selected the material identified in Exhibit 2 that you indicated you made available to Dr. Tiffin? A Yes.

[930] Q On what basis did you select these materials? A We just randomly went through it and Dr. Tiffin picked out some he thought—

Q I'm talking about how you did it in terms of getting them together for Dr. Tiffin to view. A I had a meeting with all of the department superintendents and assistant mill manager and explained to them what we were attempting to do here and what materials they had in their departments with respect to requirements that would pertain to this gathering of information and when they presented it to me they went through the information with me at that time.

Q You left them some discretion in terms of selection of the materials to present to you, is that correct? A Well, what I asked them to do was to provide me with as much as they possibly had.

[931] Mr. Belton: Thank you, Mr. Moore.

Mr. Thompson: No further questions.

The Court: Let me just ask Mr. Moore this. Was there anything about the furnishing of material or the results of these tests or was there anything about the taking of the tests themselves or the obtaining the ratings from the supervisors which to your knowledge was done with a design to

prove correlation between test scores and the job performance of these people? A No, sir, your Honor.

The Court: Was all of this testing done as objectively as you could? A Yes, sir.

Mr. Chambers: We object to the question.

The Court: All right, I'll strike that answer then and sustain your objection to the question. I just wanted to know, that's what you're after, isn't it, to find out whether or not this thing was phony?

[932] Mr. Chambers: Right, your Honor, we wanted the facts and would ask the Court to draw its conclusion from that but not just simply put the question to him directly.

The Court: All right.

* * *

[933] JOHN E. BRYAN, JR., having been first duly sworn to tell the truth, testified as follows:

Direct Examination

Mr. Lowden:

* * *

Q Would you state your name for the record, please. A John E. Bryan, Jr.

Q Where do you live, Mr. Bryan? A Bradley County, Tennessee.

Q Have you been employed by Albemarle Paper Company, a Virginia corporation? A Yes, sir.

* * *

[934] Q Would you tell the Court briefly what your educational background is? A I have a bachelor of arts, cum laude in psychology from Vanderbilt University and a master of arts in public administration from the University of North Carolina.

* * *

[936] Q Now, Mr. Bryan, I'm going to ask you to look at the contract between Albemarle Paper Manufacturing Company and United Papermakers and Paper Workers, AFL-CIO, Halifax Local No. 425, dated September [937] 23, 1963—September 15, 1965, which is in evidence in this case as the Plaintiffs' Exhibit No. 13, and I'll ask you first, the Albemarle Paper Manufacturing Company is known in this suit as Albemarle Paper Company, is that correct? A Yes, sir, the corporate name was changed at some point in the 60's, dropping the word "manufacturing," that's the Virginia corporation.

Q I'll ask you to turn to Section 10 of that agreement, and ask you to explain to the Court if you will, the operation of the seniority system at the Roanoke Rapids mill, beginning with Section 10.1.1. A This first paragraph, 10.1.1 sets forth the basic principle involved in the application of the seniority system as it applies to personnel promotions, reductions in force, lay-offs, personnel changes, and the essence of it is that when employees are to be promoted or demoted or laid off as the case might be that ability [938] will prevail, by that is meant qualifications, but when ability, all the factors that constitute ability are relatively equal, then seniority will be the determining factor as to who is moved from one job to another or who is laid off. And this seniority is applied within established lines of progression within a given department as shown on the line of progression chart,

and is known as Appendix F. For example, I refer to Appendix F. in the "B" paper mill department, the paper machine line of progression, the top job being machine tender.

The Court: May I call attention to the fact that the Appendix F. handed me relates to the September 18, 1965 agreement.

Mr. Lowden: I meant for you to have them both.

The Court: I don't have the one for '63. A Nor do I, your Honor, I have the '65 and '68.

[939] Mr. Lowden: Can we use the '65 one?

The Court: Was it the same? A It was the same in '63 and in the case of the paper machine line of progression.

The Court: All right, go ahead. A By applying the seniority clause within the line of progression this means that individuals having occupational job family group is known as a progression line and by family group I mean that the jobs have a relationship to each other. They are similar jobs and the jobs are set up in the line of progression with the least difficult, the least responsible job being at the bottom, progressing upwards to the most responsible and most difficult job at the top, with corresponding rates of pay, increasing as we go from bottom to top. Such that the second job in the line of progression in the case of the paper machine in the "B" paper mill, seventh hand requires a knowledge of the work of spare [940] hand number 4; the 6th hand requires the knowledge and skill that is acquired working as a seventh hand and spare hand number 4, and so on up the line and it is a progressive sort of thing and this is the basis for the training system that is used in the paper industry and many other industries for that matter. People are

trained by getting training and experience on the job in these various capacities.

Also, a line of progression composed oftentimes of jobs in which the people must work together as a team as is the case on the paper machine and the individuals that hold these various classifications have certain functions to perform just as many members of a football team have certain functions to perform in executing a play and they all must operate together and each accomplish his job or the paper machine doesn't function properly. This is why the seniority clause [941] sets forth that the provisions are applied within the established lines of progression.

Mr. Lowden:

Q Let me digress there for a moment, is there a labor market in Roanoke Rapids from which the Albemarle Paper Company may hire a trained machine tender if it needed one tomorrow? A No, sir. The only place to obtain a machine tender is from another paper mill and this is done when a new paper mill is built the personnel people go to other paper mills and obtain people in lower classifications such as back tender who has many years of training and experience to reach that position and offers them the opportunity to go to machine tender at a higher rate of pay, not that this new mill is going to pay any more than the old mill for a machine tender but the machine tender job pays more than the back tender. A back tender, for example [942] may see a machine tender ahead of him who's got ten or fifteen more years before he reaches retirement age and this is a much better opportunity for him.

Q But you can't go out in Roanoke Rapids and employ a machine tender right off the street? A No, sir, and there would be no way of getting him the training and experience

that he needs other than on a paper machine itself and it cannot be done through classroom instruction or anything of that type.

Q Is it necessary that the machine tender, the top rated man there, is it necessary that he perform all the jobs in that line of progression? A Yes, sir, it is. And he is responsible for the operation of that machine and the functioning of that crew there. He has supervision above him but he is the top skilled employee and he needs to know what each person is doing and should be [943] doing on that machine and all the parts of, that machine is quite lengthy and covers some considerable area and he can't even see all the people at any one point.

* * *

[944] DR. RICHARD BARRETT, having been first duly sworn to tell the truth, testified as follows:

Direct Examination

Mr. Belton:

Q Would you state your name, please? A Richard S. Barrett.

Q Where do you live, Dr. Barrett? A 5 Riverview Place, Hastings-on-Hudson, New York.

Q And what is your educational background? A I have a bachelor of science in administrative engineering from Cornell University, 1948; a master of arts in education from Syracuse University in 1951; Ph.D. in industrial psychology from Western Reserve University in 1956.

Q Dr. Barrett, do you have an area of specialty? A My general area is applied psychology, applied to industrial problems and lately to educational problems.

Q Could you give us some examples of the kind of work you have been doing in your [945] area of specialty? A I was an assistant and associate professor of psychology at New York University where I taught courses in selection for seven years from 1958 to 1965. At that time I consulted with industrial organizations on selection problems including Equitable Life Assurance Society, Standard Oil of New Jersey and Lever Brothers. Toward the end of that period, around 1965, I prepared a proposal for the Ford Foundation to study differential selection among different social and economic and ethnic backgrounds, received a grant and although I left the University I became an adjunct research professor and I supervised the conduct of the study that resulted in the book, "Testing and Fair Employment." And I have done some more work at other times, Air Force selection tests.

Q Would you just give us several firms [946] that you have been retained by with respect to consulting on testing programs? A Well, primarily, Lever Brothers, Equitable Life Assurance Society, Standard Oil of New Jersey.

Q Dr. Barrett, did you participate in the case of *Griggs* v. *Duke Power Company?* A Yes, I did. I testified for the plaintiff.

Q Have you participated in similar cases? A Yes, I have.

Q Would you name a few of those cases for us, please? A *Colbert* v. *H. K. Corporation, Hart* v. *Buckeye, U. S.* v. *Frazer, U. S.* v. *H. K. Porter, U. S.* v. *Jacksonville Terminal, Chance* v. *Board of Examiners, Castro* v. *Beecher,* and *Griggs* v. *Wilson Sinclair.*

Mr. Belton: What we'd like to do, we have a list of the cases in which Dr. Barrett has participated and rather than

having him read the list, we could have the list [947] identified and show the defendant.

The Court: All right. They did the same thing this morning.

Mr. Belton: We would like to have this identified as Plaintiffs' Exhibit No. 69.

(Dr. Barrett's resume identified as Plaintiffs' Exhibit No. 69, admitted in evidence.)

Mr. Belton:

Q. Dr. Barrett, would you identify this document, please? A. Yes, it is my resume.

Mr. Belton: We would like to offer this as Plaintiffs' Exhibit No. 69.

The Court: Very well.

Mr. Belton: We would like to identify this document as Plaintiffs' Exhibit No. 70.

(List of cases identified as Plaintiffs Exhibit No. 70.)

Mr. Belton: We would like to offer Plaintiffs' Exhibit No. 70 which is the list of cases [948] in which Dr. Barrett has participated either as a witness or on a consultation basis.

(List of cases, identified as Plaintiffs' Exhibit No. 70, received in evidence.)

Mr. Belton: We would like to offer Dr. Barrett as an expert in industrial psychology with special emphasis on testing.

Mr. Lowden: We will accept that with the remark that he didn't write the book though.

The Court: Well, he is one of four authors of a book I'm looking at entitled "Testing and Fair Employment." Is that the book you're talking about?

Mr. Lowden: No, sir, I'm talking about the book that Dr. Tiffin wrote which is the basis for all of it. But we will accept him as an expert, your Honor.

The Court: All right, sir, and the Court will.

Mr. Belton:

Q Dr. Barrett, I show you document that is identified as Company Exhibit No. 3 and [949] ask you if you have had an opportunity to review that document. A I have.

Q When did that document first come into your hands? A Last night.

Q Dr. Barrett, were you present this morning when Dr. Joseph Tiffin was testifying as to the validation study conducted at the Albemarle Paper Company in Roanoke Rapids? A Yes, I was.

Q Do you recall the testimony of Dr. Tiffin that he had followed procedures outlined in a manual called "Standards for Educational and Psychological Tests?" A Yes.

Q Let me show you this document.
(Conference between counsel)

Q I think I was asking you, Dr. Barrett, whether or not you recall the testimony of Dr. Tiffin? [950] A Yes, I do.

Q And do you recall the complete testimony of Dr. Tiffin, both on direct examination and cross-examination? A Yes.

Q Now, based on that testimony, Dr. Barrett, were the standards set forth in the manual which you are now looking at, that were not followed in the study identified as Company Exhibit No. 3? A Are you referring to the report itself?

Q The report itself and the testimony.

Mr. Lowden: May we identify the document he's looking at because we don't have a copy of it.

Mr. Belton: It is "Standards for Educational and Psychological Tests and Manuals." A Published by the American Psychological Association, Washington, D. C.

Q The question is were the standards set forth in the document you're now looking at, were there standards set forth in that [951] document which were not followed either in the report identified as Exhibit 3 or as further explained by Dr. Tiffin in his testimony? A Yes.

* * *

Q Dr. Barrett, would you briefly describe the document you have before you? A This is a policy statement of the American Psychological Association. It contains a number of sections, among [952] the most pertinent is headed "Criterion Related Validity" of which the concurrent validity described by Dr. Tiffin is an example. The book has in it several brief statements, some of which are listed as being essential for a test manual, some of which are listed as being very desirable; some of the more essential ones are printed in bold-face type, their importance not to be overlooked.

Q Would you briefly outline what some of those principles are? A For instance, C-4 says that all measures of criteria, which is what Dr. Tiffin defined as job performance, should be described completely and accurately, the manual should comment on the adequacy of the criterion; wherever feasible it should draw attention to significant aspects of performance that the criterion measure does not reflect or to irrelevant [953] factors that are likely to affect it. This is printed in bold type and listed as essential.

Mr. Lowden: If your Honor please, I think he should state the page of that book for us. A Page 16.

Mr. Lowden: And describe what he's talking about when he's reading. I believe he's talking about the manual, and what Dr. Tiffin did was conduct a validation study himself, not write a manual.

Mr. Belton: The testimony of Dr. Tiffin, your Honor, is that he had followed this document in the validation study that he conducted and I'm questioning Dr. Barrett about some of those standards or principles as set forth in there, how it compares with Dr. Tiffin's testimony.

The Court: I assume that the witness would say that he agrees with what's in the book so instead of letting you ask [954] him what he would consider as some of the procedures to be followed, I'm just letting him go ahead out of the book. You agree with all that, don't you? A Yes, sir.

Mr. Lowden: What then is in evidence so that we might —the book should be in evidence.

The Court: He's putting it in, piece by piece.

Mr. Belton: Your Honor, the only reason why we are not putting this particular document in evidence is that Dr. Barrett indicates this is his own personal copy and he would want to take it back, but it will be available to the defendants and we would like to reserve the right to introduce it, a copy of that document, for the record, but under the circumstances—

The Court: I'll let you do that.

Mr. Belton: For clarity purposes, your Honor, we would like to leave Plaintiffs' Exhibit [955] No. 71 open for the introduction of that document.

Q Dr. Barrett, would you explain to the Court the study conducted by Dr. Tiffin and the resulting report, how does that compare with the principles set forth in the document you are now looking at?

Objection: Overruled

Mr. Lowden: Your Honor, I think he ought to find out whether or not it violates the guidelines of the EEOC rather than some psychological association's guidelines. They may be incorporated but I don't know that.

The Court: This testimony is designed I take it to show if it can the inaccuracy of the procedures and methods employed by your witness and I'm going to let him testify.

Mr. Belton: Dr. Tiffin testified he used this.

The Court: You've won this one, go ahead.

[956] A The report does not give any description of the criterion and it was after Dr. Tiffin testified that I learned some of the details of how it was done; there was not enough detail in my mind to assure me that factors that are relevant are all included and those that are not relevant are excluded. Shall I continue?

Q Please. A Another section, this is page 17, at C-4.4, it says, "The time elapsing between the test administration and the collection of criterion data should be reported . ." in the manual. This I learned only after the testimony was given that it was not included in the manual nor in the report and this is an essential piece of information.

Page 18, C-4.5 says, "the criterion score should be determined independently of test scores. The manual should describe any precautions taken to avoid contamination of the criterion or [957] "should warn the reader of possible contamination." This is essential and again the report says

nothing upon this topic and the description that was given by Dr. Tiffin was most sketchy on this point, a most critical point.

It also says, page 18, section C-5, "The sample employed in the validity study and the conditions under which the testing is done should be consistent with the recommendations made in the manual and they should be described sufficiently for the user to judge whether the reported validity is pertinent to a situation." And the procedures used are not described in the report. This also is essential. C-5.1.

The Court: You mean that it's essential that it be described in the report? A That you should know enough about the conditions under which the testing was [958] done to make sure that they were done properly. There are many ways in which tests may be improperly administered.

C-5.1 says, "The basic statistics which should be reported in the manual for validation sample are measured central tendency and variability." This is essential. No such statistics have been presented.

Section C-5.2 says, "The validity sample should be described in the manual in terms of those variables known to be related to the quality tested such as age, sex, socioeconomic status and level of education. Any selective factor determining the composition of the sample should be indicated." Essential. This was not described in the report and was described somewhat orally later. C-5.4.

Mr. Belton:

Q Dr. Barrett, to what particular point in [959] the testimony were your last remarks addressed? A Dr. Tiffin said that he had no information on the race of the individuals and Mr. Moore testified that there were six or so, four to six, who were black. There is no real indication as to the age of the people although it was indicated that there

were long and short service employees and in a mature organization you would assume there are people of wide age range which is critical because older people are quite different in their test behavior and job performance than younger people and it may be that test scores are in no way indicative or useful in determining the validity of a test for selecting a different kind of person, namely, a younger person.

C-5.4. Well, this is what I said. It says, "The validity of a test should be determined on subjects who are [960] at the age or in the same educational or vocational situations as the persons for whom the test is recommended in practice. Any deviation from this requirement should be described in the manual." Essential. No such deviation was described and based on the testimony I heard, there are people who are not in the same educational or age situation or vocational situation, as people who would be taking the test.

Page 20, C-6. Says, "Any statistical analysis of criterion relating to validity should be reported in the manual in a form from which the reader can determine what confidence is to be placed in the judgment or predictions regarding the individual." This is essential. One of the things that was lacking totally in the report was what kind of statistic was used and there was only under examination that we learned [961] that a standard statistic of Phi co-efficient was used, but it was not in the original.

Page 21, Section C-6.11: "A report in the manual or elsewhere concerning the criterion related validity of tests should ordinarily include: (a) one or more correlation co-efficients of a familiar type; (b) description of the efficiency with which the test separates criterion groups, and (c) expectancy tables or (d) charts that graphically illustrate the relationship between the test and the criterion."

Now, a correlation of a familiar type was included for all the data; however, charts that graphically illustrate the relationship between the test and the criterion were reported only in those cases where the tests worked out and in fact only in that particular case where the test worked out the best, giving a distorted [962] picture of how the test would look since all the bad data were not included.

That's the end of the pertinent parts of the standards for educational and psychological test and manual.

Mr. Belton:

Q Dr. Barrett, could you briefly describe, very briefly, the procedure for validating a test? A Well, the first steps required in validation of a test is a thorough job analysis so that the person knows what jobs are covered, knows how to cluster jobs as necessary to put jobs of a similar nature together for validation purposes, to develop a criterion and if one is developing a test battery which is not the case here, to decide which test to pick. Then the test should be tried out and validated by comparing the test scores with the criterion scores. As Dr. Tiffin [963] mentioned, there are two essential ways of doing this and one is called predictive validity in which the test scores are retained from a group of applicants until they have had a chance to perform on the job and measurements can be taken. The virtue of this is that this is certainly the best way to get the information. The trouble is it takes too long.

The concurrent validity study which he described and of which this study is an example, has the virtue that it is quick, it literally can be done in one day. It is collecting the data by having ratings done one day and at the same time having the tests given. It has the vice that there are many problems. One is that as in this case it's quite possible to include people who are not like the candidates,

quite possibly very much older people are included and the test [964] score and job performance may have a different relationship than would be true of candidates. Furthermore, we don't know anything about those people who over the period of time have left this sample. The more capable people have perhaps been promoted out of this work group. Less capable people have perhaps already been fired. Unstable people or people who have just happened to not work out in general may have quit of their own accord. There are many reason why a concurrent validity study is not desired, and the only real virtue is that it's quick.

Q Again, referring you to the testimony of Dr. Tiffin and the procedures of the standards used to validate the test, strike that; referring to the testimony of Dr. Tiffin and the procedure used to validate the tests, would you compare what he did, Dr. Barrett, to the standard you just [965] outlined in terms of what he did? A In terms of the standards in this book?

Q Just in terms of procedure in terms of validating these tests. A Well, part of what I said is that a person administers tests and gets the criterion information. Implied in that is that the individual does it himself or does it under his direct control. I think it's extraordinarily bad practice to have the basic data for studies collected by people who may not have the training to do this work properly and even worse practice to have the data collected by people who have an interest in the outcome.

Q Well, what about job descriptions? A Job descriptions I thought were totally inadequate. There were no job descriptions of a written nature. Dr. Tiffin testified that he studied a chart of progressions, spent about a half a day in the plant, and even if someone has a [966] background by

having been through other plants this is a very limited amount of information from which to conduct a validity study.

* * *

Cross-Examination

Mr. Lowden:

Q Dr. Barrett, have you ever been in the Albemarle Paper Company mill in Roanoke Rapids? A No, I have not.

Q Have you ever been in any other paper mill? A Yes, I have.

Q Which? A Meade Corporation, Chillicothe, Ohio.

Q And that's the only one? A Yes.

Q How long ago were you in that? A Oh, this was back around 1955.

Q Did you make a study for the Meade Paper Company in 1955? [967] A Yes. The purpose of my being there was to write job descriptions for the purpose of job evaluation.

Q You did not set up a testing program? A No.

Q Now, you testified about several paragraphs in this red book which is called "Standards for Educational and Psychological Testing Manual," A Yes.

Q And you pointed to various sections I have briefly scanned and it appears to me that most of those go to the form of the report that Dr. Tiffin had made and not the substance, is that true? A I believe that these raise very important substantive issues. I think the report should state, for example, what the jobs are that are being covered

in the report, what statistics were used so that one knows what statistics are more appropriate in given circumstances than others. These [968] things were left out completely.

Q From the report? A Yes, sir.

Q What you were just talking about was left out of the report? A Yes. Excuse me, some things were left out of the oral presentation as well. We still have no data as to age of the people for example who took these tests, which is important.

Q I take it that, since this is your field, you do believe that psychological testing is a good employment tool, is that right? A Yes, I do.

Q And as a matter of fact, isn't it true that the only practical type of validation is concurrent validation, isn't that true? A No, that's not true. I've done a study which was partly made possible by a foresighted member of the company who stored away information for six or seven years, we then came back and compared that [969] information with the later performance of the people on the job.

Q Assuming that the average person doesn't have that kind of foresight and you want to make a validation study and you don't have all that information, then the accepted method is concurrent validation, is that not true? A Yes.

Q And it's recognized perfectly acceptable under the EEOC and the OFCC guidelines? A Yes.

Mr. Lowden: We have nothing further, your Honor.

* * *

[972] Dr. Joseph Tiffin, re-called, testified as follows:
The Court: Dr. Tiffin, are you familiar with this red

booklet or pamphlet from which Dr. Barrett read? A Yes, I am.

The Court: Are you a member of the American Psychological Association? A Yes, sir.

The Court: Do you agree generally with the principles for validating tests which he referred to as appearing in that book? A I do, sir.

The Court: Have you conducted other concurrent type validation tests in the industry? A Yes, sir.

The Court: Have you done those tests substantially in accordance with the procedures which you employed in the Albemarle case?

Mr. Chambers: Objection:
A Yes.

[973] Mr. Chambers: Your Honor, I don't think that the other validation studies that he might have made would be pertinent to this proceeding; it certainly doesn't show that he followed the procedure in this case.

The Court: All right, sir, your objection is noted for the record.

Now, explain to me, if you will, how the recommended procedures of your Association as given to the Court by Dr. Barrett differ from those that you employed in the Albemarle case?

A Well, as Dr. Barrett pointed out, there are two ways of validating tests. The predictive method and the concurrent method. The predictive method is a follow-up method and is done if you have all kinds of time. Now, study after study have shown over the years that if you get a significant correlation with the concurrent method which was followed

here you still get a still higher correlation if you use the [974] predictive method. In other words, these correlations are very conservative statements of the two relationships. And as Dr. Barrett pointed out, with the concurrent method, the guys that couldn't do the job, they've left or been terminated. So you've got restriction of range of the people with the concurrent method. And the more restricted the range, the lower the correlation is going to be.

Mr. Chambers: I'd like to object because I don't think that's responsive to the Court's question. And I move to strike the witness' answer.

The Court: All right, sir. Go ahead.

A You see, if you have a restricted range it drops the correlation. Now, an extreme case of that, supposing everybody quit except the guy that made the highest test score, or a few guys made very high test scores, you'd get no correlation at all, zero. But you've got a range of test [975] scores and a range of ability on the job, you get a higher correlation. Now, the follow-up method, the predictive method, you've got everybody in there, and so your correlation is going to be very high, other things equal. But with the concurrent method, you've got a restriction of range, both the test score range and the job performance range. If you get a significant correlation with the concurrent method you're very safe.

The Court: Let me hear you comment on the failure in this case to provide you with any information relating to the age or sex or the race of these various testees.

A Well, Mr. Moore sent me the ages of all the men but I didn't use them, the age figures, for the reason that I ran the correlation between the test scores and job success. Now, age, sex and race were incidental, more or less unimportant in these studies.

[976] The Court: In view of the questions asked by the Court, are there questions by counsel for either side?

Mr. Thompson: We have no questions.

Mr. Belton: No further questions.

The Court: All right, Dr. Tiffin and Dr. Barrett are excused, and thank you for coming and giving us the benefit of your testimony.

* * *

[997] John E. Bryan, Jr., [having previously been duly sworn to tell the truth] re-called, testified as follows:

Mr. Lowden: Direct Examination

Q I believe when we were interrupted you had finished discussing the lines of progression, had you finished, Mr. Bryan? A I believe I can pick up where we left off. With regard to seniority being applied within the lines of progression, I think it is important to understand that, as I said earlier, these lines of progression are jobs that are related to one another and people in these jobs work together as a team to accomplish a given part of the mill's function.

For example, the wood yard department has the responsibility for getting the chips to the pulp mill; receiving the wood in the form of logs or in the form of chips and turning the logs into chips, and turning that over to the pulp mill, and the pulp mill in turn [998] takes the chip and makes it into pulp, sends the pulp on to the paper mill and the paper mill makes the pulp into paper, to give a very simple flow there, to show that these jobs in the wood yard department are related to each other in accomplishing that function but are not related to the paper mill, or to the pulp mill. And it is an occupational grouping and also the line

of progression furnishes a career opportunity for an individual to progress, so that when he's hired in and he goes into a particular line of progression he knows what his job opportunities are, he knows what he has to learn in order to reach and to reap those opportunities.

But what he learns in the wood yard, for instance, would be of no help to him in the paper mill. It's not something that is peculiar to paper mills, this is found in all forms of occupations, [999] such as, well, we've even got a dozen or so lawyers here today and the lawyers here have many, many years of experience but I'm sure that none of them would want one of their brother lawyers to operate on their appendix —

Mr. Chambers: We move to strike that, your honor.

The Court: Well, I don't think it's material; he's using it for an illustration; go ahead.

A The same sort of thing applies to these lines of progression. They are occupational lines in and of themselves, the jobs within the line being related to each other but not to jobs in other lines of progression.

Now, to go on with how this particular seniority system is set up, it is a very common seniority system.

The next paragraph, 10.1.2, has to do with those rare situations [1000] when an employee does not desire to accept a job advancement that is offered to him. There is a penalty contained in here regarding his loss of seniority status if he so elects.

For instance, if the sixth hand on a paper machine were offered the fifth hand job and declined it, then the reason for the penalty is that this would tend to what we call freeze that sixth hand and he would be blocking the line of progression, meaning that people below him would not

have the opportunity to work up into this line of progression during vacations and this sort of thing in order to learn the next higher job. And there is a problem in training to get the seventh hand past the sixth hand up to the fifth hand if they by-pass the work of the sixth hand, because it's filled with frozen people.

Then when they are in the higher [1001] jobs, they don't know the functions of the lower job, having no experience in them and this is essential as I explained earlier, to the efficient operation of the paper machine.

10.1.3 again takes care of exceptional situations. Normally seniority is followed in promotions, assuming that the people are qualified, but in such cases when the senior man is not selected the union committee must be notified by the company in order for the union to review the situation and determine whether or not they wish to contest it through the grievance procedure.

For the company's protection, the next portion of this paragraph—normally there are people in the lower jobs qualified to go up to the higher jobs. Where this does not exist, these rare cases, then this gives the company the right to select someone [1002] from another department, after discussion of the matter with the union committee, again, so that the union, if it desires to contest it, may do so through the grievance procedure.

But this is a rare sort of thing for this to occur and when it does occur it's often due to people being frozen because they were unable or unwilling to advance higher in the line of progression.

10.1.4 has to do with employees promoted to supervisory positions outside of the bargaining unit, represented by the union. It provides that the supervisor will retain his seniority back in the unit for no more than six months. The union in-

sisted on this clause to force the company to not make selections of supervisors and put them on trial and then move them back because when they move them back it [1003] adversely affect the status of at least one or more employees in the bargaining unit.

Seniority is of such nature that where one person is favored by any seniority provision, there is always another person who is adversely affected.

10.2, as I said earlier, normally an employee stays in the same line of progression his entire working career. However, there may be instances in which the person initially elects to go into one line of progression and then he gets in there and finds it's not what he thought it was or the opportunity doesn't look so good to him, he doesn't like the work, or whatever his reason might be, so a provision has to be made to let him apply for transfer to another department or line of progression. This is what 10.2 is about. He does this by making application to his foreman [1004] to the personnel department.

Now, the company retains the right under this provision of the contract to grant or deny this request for transfer because the company has an investment in the training of these people and if it were too easy to obtain a transfer the people could possibly be moving all over the mill like checkers without any regard to the effect that it has on the efficient operation of the mill, and the loss of investment in the training of the individual.

This particular clause is one that has been in the contract many, many years. It goes back as far as we were ever able to research in the history of contracts between this company and the unions at this particular mill.

Part of the paragraph has to do with persons retaining or losing seniority upon transfer and the last part [1005] where

the transfer is effected at the request of the company, for some peculiar reason there is not someone qualified within the line of progression, the company may request an employee from another line to move over and take the promotion and then such an employee keeps his seniority in his old department and line for a longer period of time because it was on motion of the company and not his own motion that he did this.

In 10.3 there are definitions of the various types of seniority used in this system—job department and plant seniority. And all of this is based on the general principle set forth in the first paragraph of this section, that qualifications come first, and this is a traditional point of conflict between this company and this union and in fact between companies and unions in general, the employer wanting qualifications [1006] to be the only consideration on the one hand and the union wanting seniority, plant seniority, generally to be the only provision upon which personnel movements are based.

The unions take the position because they contend that leaving the determination of qualifications to the employer leaves it open to some disagreement to perhaps partiality and various other considerations there, whereas the employer naturally takes the position that length of service itself is no criteria for advancement nor for retention in the event of lay-off.

Now, in this particular contract, typical of union contracts in that the parties have reached a compromise position, and put a great deal of emphasis upon job seniority in relation to the other points of seniority.

The term 'job seniority' [1007] as used in this contract means the total length of continuous service in a particular job classification. And it is cummulative within the line

of progression. For example, to use the paper machine line again, an individual who has held only the bottom job of spare hand on number 4 machine would have job seniority for that particular job classification dating from his entry into that job classification.

Now, as that person progresses up the line to machine tender then when he becomes a machine tender he has job seniority dating from his date of classification as a machine tender, but if there should be a reduction in force back down the line, say one of the paper machines was decommissioned and he ended up in one of the lower jobs, if he got all the way to the bottom, spare [1008] hand number 4, and held up there it would be on the basis of his total job seniority in that line of progression, in other words, spare hand number four, plus seventh, sixth, fifth and so on up to machine tender, and this is then tantamount to department seniority and further, in most instances, is tantamount to plant seniority because of the fact that people go into and stay in the same line of progression throughout their working career.

Therefore, when it comes to actual lay-off from the bottom job in a line of progression, it is based on not job seniority as such but really on plant seniority, the oldest man gets to stay as long as there's one job there.

And this principle is applied below that to the extra board in that people are laid off from the extra board when it becomes necessary to reduce the [1009] size of the extra board, on the basis of the one with the least plant seniority going first, plus people are assigned work from the extra board to temporary openings in the various departments on the basis of their plant seniority unless they had previous experience in the type of work that is being called for. And of course, those people have first call back to it in order to utilize their qualifications.

The Court: Did that answer your question?

Mr. Lowden: Yes, sir.

Q Now, there has been a discussion about the extra boards, would you make an explanation of what the general extra board was and the utility extra board, and how they worked? Just briefly. A The extra board is a form of labor pool and I believe they were probably first conceived by the railroads as extras to fill in when the regular employees [1010] were not available and to also fill in for vacations or what have you. And they had to have a certain number of people to run the train. The same sort of situation applies in this paper mill, that when someone was absent but it was known to be not a permanent thing, then this job had to be manned, every one of these jobs have to be filled at any given time. The mill runs twenty-four hours a day, seven days a week and you've got 365 days a year—as business demands and as negotiations with the union will permit.

But instead of trying to just go out and hire people temporarily to fill in maybe for just a shift or maybe for a week, as the case might be, that would be an impossible situation. This labor pool was developed with the people employed who appear to have potential for filling regular jobs in the future [1011] and then they were listed so that when there is a need for a person to fill a job, it's the top job, if the machine tender is absent, everybody moves up on a shift, and that takes in another paragraph of this seniority section. Then the bottom job is filled from the extra board.

Now, we had up until the summer of 1968 I believe, two extra boards, the general extra board and the utility extra board. The people on the general extra board were people who had the potential for filling jobs in the skilled lines of

progression. The people on the utility board were people who did not have the potential for filling jobs in the skilled lines of progression but who could satisfactorily perform in the unskilled lines of progression.

The Court: Were the members of the utility board all black? [1012] A They were not after some time I believe in early 1964, your Honor.

The Court: But there was a merger of the two boards in 1968?

A Yes, sir.

The Court: Go ahead.

Mr. Lowden:

Q You may go ahead. A The utility board, for example, in 1965, fed the chipper line of progression in the wood yard and the service crew line of progression, and the brokeman line of progression, to name a few. And the general board, for example, fed the paper machine line of progression in the B mill, and the paper machine line of progression in the A mill, and the digester and recovery lines in the pulp mill, as examples.

The Court: Was the general board at any time all white?

A Yes, sir, at the time that I was employed [1013] by Albemarle it was all white. The first blacks that I know of that went into it went in I believe in early '64.

The Court: Well, the two boards were then integrated about that time and in 1968 they were merged?

A Yes, sir.

Mr. Lowden:

Q Now, looking at the appendix attached to the agreement dated September 1965, I believe you have it in front

of you, Appendix F., would you indicate to the Court which are the skilled lines of progression and predominantly white and which are the unskilled and predominantly Negro, historically, I guess you would say? A Well, in 1965 the yard crew line of progression in the wood yard was fed off the general board, as was the paper machine line in the A mill, the beater room in the A mill, the finishing crew [1014] and shipping crew lines in the product department of the B mill; the lines in the pulp mill, encompassing the—the line is a forking line, the digester, recovery operation, and the caustic and the boiler operator in the old boiler room, fed out of the pulp mill department. That was out of the recovery part of the pulp mill which also has boilers; and the paper machine line of the B mill, the stockroom line of the B mill, the new power plant department, and in the technical service department, both lines of progression there were the mill and the laboratory, testing lines of progression; all others were fed off the utility board.

Q What were the educational and test performance requirement for people who went to the general extra board, new employees going on there? A High school education and satisfactory [1015] performance on the Beta and the Wonderlic. Of course, these tests—I don't mean to imply these tests were the only criteria. People were interviewed and their past experience was considered with other qualifications of that type and they were checked on as to their competence in performing past jobs and their character and that sort of thing.

Q Were there any such requirements for the utility extra board? A Yes, sir, all of those that I mentioned with the exception of the educational requirement and the testing requirement, we did not have those.

The Court: Do you know what the cut-off scores were for those tests?

A Yes, sir. In the Beta it was 100, and on the Wonderlic it was 18.

Mr. Lowden:

Q On both tests? A On either. We have two forms of the [1016] Wonderlic, A and B, to all the applicants, and a score of 18 on either one would suffice. The reason we gave two was because some people may not have been accustomed to taking a test and it is a timed test and they could call the first one for practice if they wanted to, as long as they got an 18 on either one.

Q All right, sir. I think you were asked about paragraph 10.4.1. Would you pick up from there and give us a little further explanation of seniority? A Yes, sir. This paragraph 10.4.1 means that vacancies will be filled and reductions in force accomplished in accordance with the following procedure; this makes cross-reference back to 10.1.1 which has the qualifications involved in it, so this is assumed throughout this. But assuming qualifications are relatively equal, if the vacancy is expected to [1017] continue for a period of more than two weeks then people will be considered for promotion across shift lines. Or if the reduction is anticipated to be for more than two weeks then people will be moved across shift lines to take care of the reduction.

Then we have another provision in the next paragraph as to how this takes place if the vacancy is to be less than two weeks, and the reason for this distinction is that you've got four groups of people in the shift groups that man a paper mill, in order to cover the work twenty-four hours a day, seven days a week. They rotate and according to a schedule

and one particular group, group A, let's say, is on the first shift for several days and then they go to the third shift and then to the second shift and then they're off, this sort of thing. This is a schedule they operate on [1018] and if it's for a shorter period of time, say a vacancy occurs, somebody's out sick, even on vacation for less than two weeks, it is impractical and uneconomical to move up and fill that vacancy across shifts by taking a back tender, say the machine tender's out and you take a back tender from group B and move him across to fill in on the shift that group A is working.

This is I say impractical and uneconomical because it disrupts the efficient working of this crew that work together as a team to put a stranger, so to speak, in amongst them there, in the first place, and then these people also have some personal considerations. They may ride to work in car pools and they've got their personal schedules to fit this particular schedule and if you just move them for a short period of time they may not get any sleep that [1019] particular day.

Furthermore, under the union contract, the company has to pay time and a half for work over eight hours in a given day, in a twenty-four hour period. And if you move a person from one shift to another within the twenty-four period he would have worked sixteen hours and the company will be having to pay a premium because somebody's absent. These are some of the reasons.

Then we have the two procedures. If less than two weeks then they move up within the shift or move down within the shift but the next paragraph says if the vacancy is for more than two weeks then we make an adjustment across shift lines. Because it wouldn't be fair to the back tender, for instance, in a situation where that machine tender had say

broken his leg and is going to be out for three months, to put a less [1020] senior back tender up just because he's on the same shift.

10.4.4 is another case where an exception is taken care of and you get into this with union contracts where there has been a long history of negotiations between the parties and the experience is that the contracts get longer and longer to take care of the exceptions.

It's a normal thing for the company to promote within the shift if it's going to be two weeks or less and the company wants to do this. But there may be times, because of the people being frozen in the jobs, that the line is blocked and the company may find it necessary to ask an employee to go to work on another shift. This sets up how this is accomplished.

Back in 10.1.2 there is a penalty for an employee refusing a job advance. We would get people refusing [1021] a temporary job advancement of this type so they have to put in a penalty here and this forces the senior employee who is qualified in the next lower job to take the advancement whether he wants it or not; if he refuses, then he is penalized seniority-wise.

Do you want me to continue with the seniority?

Q Yes. I believe it's section 10.5 that we're down to. A 10.5 says that all of this that I've been reading about and telling about with regard to seniority principles and applications does not apply to the maintenance department because it's got a separate provision applicable to it which is Appendix C. and part of this agreement.

Q Do I understand that in the maintenance department you have an apprenticeship program and you enter into that and [1022] and progress automatically to the top if you pass

the apprenticeship program, is that correct? A That is correct. It is a five year training program consisting of on the job and classroom training.

Q And when you get through maintenance apprentice program what are you classified as? A As a general maintenance man, I believe at the conclusion of the program he goes to a maintenance man "C", and continues on through maintenance "C" and "B" is the last step through the program until he gets up to an "A" maintenance employee, who is a generalist who performs all of the different crafts and trades involved in the maintenance of the equipment in the mill.

Q We do not have crafts as such in the maintenance department? A No, sir, this has been a most important [1023] point for this company to maintain a generalist type mechanic who can and does do all of these trades that are listed in Section C.1.4. And this is the purpose of the training program, to train him to be able to do all of these things.

Q There has been reference made many times in this case that the company has no job descriptions, is that true? A Yes, sir, that is true, there are no job descriptions for jobs in this bargaining unit.

Q Tell the Court why that's so? A There are several related reasons for that. As I indicated earlier, for instance, in using this B paper mill line of progression as an example, the people in these jobs work together as a team and they have to work together as a team. Therefore, there is no really clear-cut distinction [1024] between one of these jobs and the next lower job in any instance. There is a more clear-cut distinction between back tender and machine tender than there is between say seventh hand and sixth

hand. These people are working as a team at different places around the paper machine and therefore, the company does not want to be restricted by definitive job descriptions. For instance, that the union might throw up to the company and say, "this person is working out of classification, stop the machine and file a grievance and have a lot of litigation on it." This is a common source of dispute between companies and unions.

I have been in situations with other employers where it severely handicapped the efficient operation of the plant. It is a very costly sort of thing. Because this company has resisted union [1025] union demands to describe these jobs, the idea has been that it could only result in less efficient operation of the mill.

* * *

[1029] Q I believe that basic seniority system was negotiated in 1963, is that correct? A Yes, that is correct.

Q And then in 1965 it remained substantially unchanged, at least as far as this case is concerned? A Yes, sir.

* * *

[1032] The Court: Is the question 'did you take any affirmative action?'

Mr. Lowden: Prior to 1964.

The Court: With respect to what?

Mr. Lowden: Equal employment opportunity. A Yes, sir, I assume you mean with Albemarle.

Q With the Albemarle Paper Company. A One of the first things that I recommended and that we did was with regard to the maintenance apprentice program, the

first year that I was there, in 1963. The opening of the program was advertised and listed in the plant and otherwise through the community, but we didn't get any Negro applicants for this program and in the course of the ensuing year before the next class was to begin about September of 1964, we embarked upon a program to solicit and encourage incumbent Negro employees to apply for participation in the program. And this [1033] resulted in I believe one being selected in the class that began training in September 1964. And this selection process started some months previous to that.

I think after the passing of the Civil Rights Act of 1964 but before the effective date on July 2, 1965, we took some affirmative action and steps.

Q What were they? A We had not had any applications for transfer on the part of any of the black employees from these unskilled lines of progression to the skilled lines of progression, and we thought it would be a good idea to encourage them to make application. And again we solicited and advertised, first for those who had a high school education or equivalent to come in and talk with us about it. As a matter of fact, we went through the records and tried to find those who [1034] had such qualifications and talk with them. I talked with a number of them personally, myself, to encourage them to make application and those who were interested, we gave the Wonderlic and Beta tests to and those who qualified on that, I believe all who qualified were moved into the skilled lines of progression. They started working from the general extra board if there was not an opening available at the time. But they began to move into these lines of progression prior to the effective date of the Civil Rights Act of 1964. And subsequent to that, there wasn't but a handful that had a high school education. So

we then decided to waive the high school education requirement per se if we could be satisfied that they had the educational background to handle these jobs, and we decided to let any who [1035] wished take the Wonderlic and the Beta and if they demonstrated by that means that they could handle the jobs and had the learning ability, we would place them in. This was explained to them and they were sent letters or memos about this and they were called in and talked to about this and a number of them availed themselves of the opportunity; a number of others refused, and this resulted in some more going into the skilled lines of progression.

Q Do you recall approximately when charges were filed by the named plaintiffs in this case, that is, Moody, Mitchell, et cetera? A Yes, sir.

Q Approximately when was that? A It was in July of 1966. We were notified by the EEOC that there was a charge filed against us and subsequently when we got the charge it was dated as having [1036] been signed by plaintiff or plaintiffs in January I believe, of 1966, and subsequently the EEOC told us that they had received the charge in May I believe of 1966. We had heard something through the news media that there was a charge against us some time before we were notified that there was a charge.

* * *

[1037] Q The question was whether or not the EEOC ever gave us an opportunity to respond to the charges. A They sent an investigator in and the investigator told us that we could make a statement of position there but before the deadline for our sending [1038] in our statement the plaintiffs filed suit in this court against us so that our statement

had not even been received by the time that the plaintiffs filed the suit much less a finding of fact or conciliation having taken place.

* * *

[1041] Q Now, turning your attention to the negotiations of the contract that is in evidence now as the Plaintiffs' Exhibit No. 15, and I want to ask you if you have a copy of that in front of you together with a copy of Exhibit F. thereto, and a copy of Appendix F. of the 1965 agreement that you had before? A Yes, sir, I have all three of those exhibits in front of me.

Q With respect to Appendix F. to the agreement which is dated September 23, 1968, does that reflect the changes from the one that had previously been in effect, Appendix F. to the agreement dated September 23, 1965? A Yes, sir. There were quite a number of changes.

[1042] Q Would you explain to the Court when they were made and what the changes are? A All right, sir. Negotiations on this contract took place in August and early September of 1968 and in the early part of 1968, prior to the opening of these contract negotiations, we made some amendments to the 1965 contract with regard to these lines of progression. The company proposed to the union and negotiated with the union and the union concurred in the change in the boiler room department; if you'll notice by comparing the '65 Appendix F. to the '68 Appendix F., you will see that in the '68 only one line of progression appears. And this was negotiated in the early part of 1968 prior to the contract negotiations—

Mr. Chambers: Your Honor, we have set forth in paragraph 11 of the stipulations the matters that are now being testified [1043] to. I don't know if this is amplification of

the stipulations or not but this same matter is set forth in the stipulations.

The Court: Well, let's not duplicate it if it has already been stipulated, Mr. Lowden.

Mr. Lowden: I wanted to amplify what the effect of that is. I think very briefly some of it is in the stipulation, but I would like to have Mr. Bryan make an explanation to you of what it means.

The Court: I'll let him do it. I seem to recall that a similar request was granted for the plaintiffs with respect to someone's testimony. Go ahead.

Mr. Lowden:

Q Let me state to the witness this: that most of these changes are spelled out in the stipulations of facts; could you review them quickly and I will to the one I want to ask you about. A All right.

[1044] Q Go ahead. A Another change that was made in the early part of 1968 was in the beater room of the A paper mill. On the '65 appendix there, notice there are two lines of progression there, beater man, brokeman; and in the '68 in the upper right hand corner you will see that there is only one line of progression.

Q Now, prior to the merger of those lines, the brokeman line came off the old utility extra board and the beaterman came off of the old general extra board, is that correct? A That's correct and the same thing applied in the boiler room, boiler operator came originally from the general extra board through some other jobs and the fireman line came from the utility board.

Changes that were made in the contract negotiations themselves, in the wood yard department, the crane [1045]

operator line of progression and the chipper operator line of progression were dovetailed as shown in the 1968 Appendix F. into one line of progression which was formerly one that came off the general extra board and one that came off the utility board.

Q And could you tell us how that was merged? A Well, as I testified earlier, I kept up with all the developments in this area of my responsibility, such as cases that had been ruled upon. Of course, there were not many at this point but settlements with the EEOC and OFCC and what other employers and unions were doing, and the foremost one was, at that point, particularly in our industry, if not in industry in general, was the *Crown Zellerbach* settlement that had this dovetailing of these lines in the wood yard proposed by Franklin D. Roosevelt, Jr., meeting with the parties [1046] in New Orleans.

The Court: Did you say settlement? A Yes, sir.

The Court: I thought that was an arm's length determination.

Mr. Woods: We settled several, your Honor, before we got into court.

The Court: Judge Heebe made one that did stick, didn't he?

Mr. Woods: He had the same authority that you have, your Honor.

We did meet with FDR, Jr., then chairman of the EEOC, in New Orleans in late '65 or early '66, I believe, and did what they're talking about. But subsequently, that didn't satisfy the government.

The Court: All right, sir.

A That was the state of affairs at that point in time, and this appeared to be what the government at least thought would resolve disputes with regard to [1047] wood yards in paper mills about lines of progression.

And this dovetailing meant that the jobs were ranked according to their pay in the two lines of progression and then they were intermixed, putting it in one line of progression going from the lowest pay to the highest pay, and in our particular case this meant that the chain operator's positions of the yard crew line of progression fell in between the chipper operator number one and the chipper operator number two, to use an example of how this dovetailing worked.

The people that were involved in that retained their seniority status that they had on the old job since as was pointed out in the testimony of one of the witnesses from the wood yard yesterday who was a chipper operator number two, there were subsequent lay-offs and people who had formerly been in the [1048] other line of progression in higher jobs were reduced down and he held onto his job because he had more seniority and they went on down and out, in some instances. Also, this places the people in the course of their seniority as next in line for promotion to the next higher level job, when the openings occur.

Mr. Lowden:

Q Did they, in order to do that, have to pass any tests? A No, sir.

Q Did they have to meet any high school requirements? A No, sir.

Q So the effect of the merger at that time of the lines was you put them in the lines and once you get in there you don't have to take the tests or have a high school education any more, is that right? A That's correct.

Q Go ahead. [1049] A And another change that was made, and these changes came out of what we had found to be the state of development in the industry, particularly the paper mill industry, at this time. And we were trying to put ourselves in a good posture in this case, so that there would be nothing that we hadn't done that would call for injunctive relief.

Mr. Chambers: Your Honor, we object to that and move to strike.

Overruled

A We made some changes, and if you'll look at the upper right hand block of pulp mill there is a job of Kamyr operator on the left hand side. The Kamyr is a piece of equipment that was not related to the equipment operated by these other people and it should not have been in that line of progression. The other people other than the operator himself, who [1050] worked in the Kamyr or in other jobs such as lift truck operator and laborer, and yet they had no opportunity to progress to the top job on that piece of equipment, the Kamyr operator. So we pulled that out and set up a line of progression that you see on the '68 chart, third from the top on the right, that is entitled the Kamyr department. That opened up opportunity for those people to progress on up and those people in the jobs other than Kamyr operator at the time were black and the Kamyr operators were white. And the Kamyr operators were downgraded to stockroom second helpers, that's where they had come from before.

Then the payloader job was in a line of progression as shown under the pulp mill, the lancer, lift truck operator I referred to previously and the salt cake man and laborer, but that is not in the true sense a real line [1051] of progression because those jobs weren't related. They had just been

grouped together as unrelated jobs and somewhere in the past when parties had agreed to put arrows in between to provide a line of progression for people to get the higher job rather than to hire people directly into some higher paying job. So it really made no sense from an occupational standpoint and didn't afford the people in these jobs ample opportunity for advancement. So that pay loader job was placed into the service department line of progression at the top of the line because it was a higher paying job than those other jobs in the service department and it is a piece of equipment that is used in the same manner that the Dempsey dumpster in serving various other parts of the mill, various functions are performed throughout the mill, not just [1052] the wood yard or the pulp mill and so forth. So it made sense there to put that in at the top of that line of progression.

And the service department at that time was filled entirely by blacks. The lancer job that was in that line of progression I mentioned in the pulp mill that had unrelated jobs, was taken and placed into the pulp mill line of progression that feeds from the general extra board, given some other function and named 'utility helper', so that those people could advance on up as far as recovery operator if they were so qualified, which is one of the highest paid jobs in the mill.

The salt cake man job was combined with the job of second fireman in the boiler room because neither of [1053] those two jobs is a full time job and they were somewhat related; the second fireman moved coal in the boiler room and the salt cake man unloaded salt cake for use by the pulp mill, so that they were jobs that had similar functions to perform. And it opened up an opportunity for the salt cake man to progress to higher jobs that we afforded these firemen earlier.

I believe those are the principal changes that we made in that Appendix F.

Q Were they the company's proposals for changes in seniority? A Yes, they were.

Q Did the company and the union agree on some changes in the seniority provisions of the 1968 agreement? A Yes. The principal change was in this matter of transfer that in the 1968 contract resulted in paragraph 10.2.1 and paragraph [1054] 10.2.2 and paragraph 10.2.3.

Q Would you explain to the Court what the effect of those changes you just mentioned were? A Well, we already had this 10.2.1 and in essentially this form in the older contract as I mentioned earlier. It gave employees an opportunity to request transfer to other lines of progression in other departments but in the course of talks with the plaintiffs and the EEOC and in following other employers and union cases, particularly *Crown Zellerbach* and *International Paper Company* and their settlements either with the EEOC or the OFCC, we encountered this objection—that even though the opportunity was there for transfer—which I don't believe was there in the cases of *Crown Zellerbach* and IP—but the point was raised that if an employee did go to another line of progression then he [1055] would have to go to the bottom of the job, he would have to take a pay cut and he would lose his job and department seniority. So in order to eliminate that as a possible objection, we put in 10.2.2, that provided that the transferred employee would be vested with the department and job seniority equal to that held in his last job or equal to that held in the lowest job in the line of progression from which transferred.

It had the effect in the lowest jobs, as I explained earlier, he had cumulative job seniority for every job in that line of

progression and that was tantamount to department seniority and in most instances to plant seniority, since most of them worked only in one line of progression.

This got around that objection. And, incidentally, we got the idea from what these other paper companies had [1056] agreed to with the various government agencies' blessings.

The next one, 10.2.3, has to do with letting the employee not suffer in his rate of pay when he makes a transfer, that is, that he can carry his normal rate of pay over to this other job, even though it normally pays a lower rate, he would be as we say in labor relations, red circled at that rate, he would retain that rate until such time as he got promoted to a job that paid that much or more. So he didn't suffer rate-wise as a result. This was the purpose of those clauses and the reasons that the company and the union put them in.

* * *

[1059] . . . in 1965; we were required to notify the union when major changes of this type were made and the company after evaluating the situation would inform the union of its decision as to the size of the crew and the rate of pay and the union has the right and privilege of meeting with the company for the purpose of renegotiating such rates. All of this was done, entered into negotiation with the union and we had an agreement concerning the lines of progression and jobs and this sort of thing, and explained the whole thing to them, showed them what the power plant was going to consist [1060] of. They agreed that we would have to go outside the find the power plant operators but naturally they were representing the incumbent employees and they were interested in getting any of those in if at all possible, so we had a discussion and review of the qualifications of incumbent employees. We ultimately did take some incumbent em-

ployees as I said, primarily from recovery, to go into the helper positions but we went outside and recruited the power plant operators.

The Court: You kept Birdsong and Norwood? A Yes, sir. Birdsong and Norwood were boiler operators in the old boiler room and as I recall, the company's initial position was that there was no one in the old boiler room who could qualify for any job in the new power plant but the union asked us to go over it with them and we went over every individual [1061] and we had already done this, the management had, so we again went over it with the union and after reviewing the background and qualifications of all these people, the union persuaded us to agree to take Birdsong and Norwood as helpers and provided they could pass some tests.

One was—well, they had to pass these intelligence tests we've been talking about, plus a test that the union agreed to be designed by the power plant superintendent, asking questions about numerical calculations that were required of people in the power plant jobs. This was done and they were successful in passing this and those two were put into the power plant as helpers and they were given training along with the other helpers.

* * *

Cross-Examination

[1062] Mr. Chambers:

Q Mr. Bryan, the Court asked you a moment ago about integrated call boards? A Yes.

Q Would you tell the Court how many white employees you had on the utility board in 1965? A I couldn't say.

Q Did you have any? A I know there were—in 1964 there were a number of blacks on the general extra board and probably at that time there probably weren't any whites on the [1063] utility board because we had some setbacks and the board had gotten too large and we had to even reduce some off of the utility board so it was probably composed of long service people, so they would all be black in all probability.

Q Up until 1965, Mr. Bryan, had you had any whites on the utility board? A Not to my knowledge.

Q So in 1965, would you tell the Court the number of black employees you had on the general board? A I don't recall that number, there were several. I believe you've got that in some exhibit we prepared 'way back then.

Mr. Chambers: Your Honor, in connection with the racial composition of the various boards, I would like to call the Court's attention to subparagraph L. of paragraph 12, appearing on page 9, and this shows [1064] that there were two Negroes on the general board and sixty-two whites, fifty Negroes on the utility board and no whites as of June 30, 1967.

Q Now, Mr. Bryan, you testified that in 1968 you merged the two boards, how did you accomplish this? A Well, all the boards themselves were lists of people and there were two lists and they were just merged into one list with the person with the highest plant seniority I presume at the top of the list.

Q Is it your testimony, Mr. Bryan, that a person who was formerly on the utility board is now called to do what you classify as skilled work? A I would assume that there have been instances in which some have but I would also

assume that there have been instances in which some have not because I know of personal knowledge that some [1065] would not be able to perform work in the skilled lines.

Q During the time you were there after the merger, would you tell the Court the name of one person who was formerly on the utility board who was called to do skilled work? A I doubt if I could. I was in Richmond during that time and the board was under Mr. Moore's direct supervision.

Q So you don't know of any such person, is that correct? A I know that Mr. Moore told me that there were people.

Q Do you know of any person who was formerly on the general board who had been called or was called during the time that you were with the company to do unskilled work, as you term it? A Yes, there have been some.

Q I'm saying do you know of any such persons at all? [1066] A No, I don't know them by name. I know that it was reported to me in my capacity as director of industrial relations that there were some.

Q By Mr. Moore? A Yes.

Q And that was in 1969? A Well, after the time that it was merged.

Q You began high school requirements about 1952, is that correct? A Some time in the early to mid-50's, I don't know what year.

Q Do you know how many white employees were hired subsequent to 1952? A No, I do not.

Q Do you know the number of white employees you hired subsequent to 1952 without the high school education? A During my tenure there, there were no employees of

either race hired on to the general extra board without a high school education or its equivalent that [1067] I know of, with the exception of any who may have falsified their statement as to that.

Q So you don't know of any employee hired subsequent to 1963 when you went with the company without a high school education who was assigned to the general extra board? A No, I don't know of any.

Q Did you follow the same procedure in the employment of personnel where a person or persons were assigned to the utility board, as you did when persons were assigned to the general extra board? A What do you mean by the procedure?

Q Could you tell the Court what procedure you followed when you employed persons who were assigned to the utility board? A Well, as I said a minute ago, the utility board had so many high seniority people on it, we may have hired some for that board during my tenure but I don't recall [1068] it, that it was necessary to hire any. We had problems at times because we weren't getting enough work off of that board to justify keeping that number of people and this is hard on the individuals who are there and not fair to the senior people that are on the board, so on one or more occasions we had a reduction from that board to get it down to the point where they could get more work, the senior people.

* * *

[1111] Q So in paragraph 10.2.1, is the effect of that provision to transfer the previous preference of job seniority to department seniority? A Ten what number?

Q 10.2.1. A 10.2.1 doesn't transfer the individual's seniority, this was why we put in 10.2.2.

Q Well, would the effect of 10.2.1 and 10.2.2 be to transfer the previous reliance [1112] on job seniority to department seniority? A I wouldn't put it that way, you transferred the person's job, department and plant seniority and in most instances because of definition of job seniority it was tantamount to department and plant seniority.

Q All right. Now, 10.2.2 states that if the transfer is granted the employee will be vested with department and job seniority equal to that held on last job or equal to that held in the lower job in the line of progression from which transferred; now, that doesn't transfer plant seniority or give him the plant seniority for promotion purposes within the line of progression, does it? A He doesn't lose his plant seniority by transfer from one line of progression or department to another.

Q It's not plant seniority for purposes [1113] of promotion. A No, sir.

Q And it is not plant seniority for purposes of being bumped back in case of a reduction in work force? A Only if he's bumped off the extra board it's by plant seniority and as I said earlier, it's tantamount to being plant seniority in the bottom job in a line of progression for most people since most of them have been in the same department all their career.

Q But those who have not been in the same department all of their career they had for promotional purposes and bump back purposes only departmental seniority? A Job seniority and departmental seniority that they had in their old department.

Q Now, in paragraph 10.2.1, does not this provision vest the absolute discretion of whether to grant the transfer to the [1114] company? A Yes, sir, it does.

Q So even if a black employee wanted to transfer to another line of progression whether to grant that transfer would be left to the sole discretion of the company, is that correct? A That's correct.

Q In paragraph 10.2.3, does the company in deciding to fill a position, have to give preference to incumbent employees over new hirees from the street? A That wouldn't be under 10.2.3, you mean under 10.2.1.

Q Let's take them both together, 10.2.1 and 10.2.3. A Well, as I answered your previous question, the company has the discretion whether or not to grant the transfer so it's up to the company to decide how to fill the job except where the job is filled from within the line of progression.

[1115] Q Again looking at Exhibit F. attached to the 1968 agreement, if an employee in the wood yard, for instance, take a tractor operator, requested transfer to the A paper mill and the company agreed to the transfer, would you explain to the Court exactly how this would affect him with respect to the job seniority, plant seniority, and department seniority, and let's assume an employee of ten years plant seniority with the company. A You want to assume a certain amount of job seniority?

Q Let's assume a five years job seniority. A Has he been in this same line of progression all this time?

Q Let's assume ten years with the plant, five years on the job, this particular job, tractor operator. A O.k., he would carry his ten years plant seniority over to the A paper mill; [1116] he would carry not just his five years as a tractor operator on the job and department seniority but he would carry his whole ten years if he started ten years ago at the bottom job of laborer and had been in that line of progression the whole time.

Q In the wood yard department? A Yes, sir. He would start over there as a back plugger number 2 with ten years job seniority and this would probably mean that he would be immediately placed at the top of the seniority list of back plugger number 2 and would be the next one in line for promotion to back plugger number 1. And when he got up to back plugger number one, he would probably be at the top of the list again and the next one in line for promotion to front plugger number one and so on, because he had all this service there and this is what this was designed [1117] to do, to put him in a position where he could progress rapidly up the line of progression. We couldn't just put him in at some point further up without knowing these other jobs but give him the benefit of his seniority that he carried with him and move right on up, in event of reduction in force, he would have seniority and he would be the last one laid off out of that back plugger number two, in fact, others would come down from higher jobs and go out the gates on the streets and he would hold on there.

Q If this tractor operator, just for purposes of comparison, moves over, you testified he would have ten years seniority in the department and on the job? A Yes, sir.

Q And if the back plugger number 2 has five years seniority on the job and with the plant, the tractor operator who had transferred would go in with more seniority [1118] for purposes of promotion and bump back than the back plugger number 2? A That's right.

Q Does that contract provision provide for job posting of vacancies? A No, sir, I know of no provision in that contract for posting vacancies.

Q Do you know why you didn't include that in the contract? A Well, it wasn't in there when I got there and I

wasn't about to put it in, I had experience with that and it's a heck of a mess to administer.

Q If a black employee in the former chipper line of progression wanted to transfer to perhaps the A or B paper mill, he wouldn't know of any vacancies in the A and B paper mills without posting the job, would he? A He wouldn't have to know of vacancies, Mr. Chambers, he could file his request today and it would remain on file until [1119] a vacancy occurred and then it is our obligation, obligation of the company to inform him of the vacancy.

Q Now, you were testifying about your familiarity with labor practices in other industries, would you tell the Court whether it is a practice or not a practice for companies to post vacancies? A Posting is in a number of contracts but I am sure I can say I've never signed my name to one with posting in it that wasn't already in there when I took over the responsibility for it.

Q Well, that's a matter that I suppose we have to—

The Court: He doesn't like that particular provision.

Mr. Chambers: I can understand why.

Q Taking the position that you have, Mr. Bryan, an employee really wouldn't know if a vacancy occurred in the other [1120] department, would he, without posting? A Not except by word of mouth; as I said, he doesn't need to know.

Q He wouldn't know if the company granted him the first vacancy? A Oh, he'd find that out, yes, sir.

Q That would be by word of mouth, too? A Yes, but you can be sure that he would find out.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILSON DIVISION

Civil Action No. 989

JOSEPH P. MOODY, ET AL.,
Plaintiffs,

v.

ALBEMARLE PAPER COMPANY, ET AL.,
Defendants.

Proceedings before the HONORABLE F. T. DUPREE, JR., Judge, Presiding, United States District Court for the Eastern District of North Carolina, Wilson Division, Courtroom No. 1, Raleigh, North Carolina commencing at or about the hour of 9:00 o'clock a.m., August 3, 1971.

APPEARANCES:
(As heretofore noted)

* * *

[1130] The witness, EDWARD C. MOORE, JR., [having previously been duly sworn to tell the truth] returned to the stand and testified as follows:

Direct Examination

Mr. Lowden:

Q Would you just state your name again for the record, Mr. Moore. A Edward C. Moore, Jr.

Q You have testified previously in this matter? A Yes, sir.

Q I believe you have said that you are the person in charge of employment relations at the mill in Roanoke Rapids and in charge of the records and files there pertaining to the employees? A That is correct.

* * *

[1154] Q Since September 23, 1968, has there been any change in the hours that you work in the wood yard department? A Yes, sir.

Q Would you explain what happened there? A There are two types of operations in the wood yard department. It basically breaks down into long wood and chips and short wood which is pulp wood four feet or less. The short wood operations, due to an increase in the facilities for loading chips, and also for the long log operations, the short wood operation was curtailed to two shifts five days a week. This necessarily affected the crane operator, American, large, the chipper operator No. 2, the chain operator, the tractor operator, and the laborers' classifications in the wood yard department.

Q And in the A paper mill department, have [1155] there been any changes there? A Yes. The No. 2 paper machine was shut down the past year and that regressed one-half the total personnel complement in the A paper mill department. The beater room is manned by one beater man.

The Court: How come you to shut that No. 2 machine down? A It was just uneconomical.

Mr. Lowden:

Q Coming down to the product department of the B mill, did something happen there? A Yes, the entire finishing crew department was shut down, I believe in 1969.

The only classification that remains in that dual line of progression, I believe, is core cutter.

Q The what? A Core cutter. This gentleman cuts cores for a paper machine.

Q Did anything happen to the shipping crew? [1156] A No.

Q Was the shipping crew curtailed sometime prior to 1968? A Yes, it had been curtailed prior to 1968.

Q Has anything happened to the Kamyr department? A The Kamyr shut down, I believe it shut down in 1969.

Q What was the reason for the Kamyr in the first place, and why did it shut down, just make it real brief? A The Kamyr was to produce pulp for the papermaking facilities in Richmond, Virginia and as the mill in Roanoke Rapids expanded its production, it required more and more of the pulp produced in the pulp mill. Therefore, we didn't have pulp to sell on the market and our paper machines now can use more pulp than we can produce.

The shipping room department of the A paper mill also curtailed, attendant to the No. 2 paper machine shutting down. [1157] This also affected the A paper mill, A paper mill test men in the service department. We have one A mill test man in the A paper mill at this time.

* * *

[1196] Mr. Belton:

Cross-Examination

* * *

[1220] Q I believe you testified also, Mr. Moore, that you had a merger of the extra boards in 1968, is that correct? A Yes.

Q Prior to the merger in 1968 you had the utility extra board and the general extra board, is that correct? A That is correct.

Q And the utility extra board served certain lines of progression and the general extra board served other lines of progression, is that correct? A That is correct.

Q Do you know if these lines are still being serviced the same way after the merger in 1968? A No, sir, they are not.

Q How are they called off the board, for example? A The purpose of merging the two boards was that we felt that there were possibly some [1221] employees on the utility board who were capable of performing some of the duties in the skilled lines of progression but certainly not all of them. We would like to have assigned them to these areas to determine how they did and if they were satisfactory perhaps give them consideration when vacancies occurred and we did do that.

Q Do you know whether, Mr. Moore, the employees are recalled from the combined board for any and all jobs on the basis of seniority? A I don't understand your definition of recall. Recall to me says that when an employee has been permanently assigned to a job in one of the departments and thereafter demoted to unemployment, he retains the right back to that job or department, and that is called recall.

The Court: You were just talking about when they needed a man for a particular job, would they call them in line of seniority? [1222] A (No answer)

Mr. Belton: Your Honor, I wanted the witness to explain how they operate under the merit situation, the call boards, and I was—

The Court: He says recall has a different definition from apparently your question involved.

Mr. Belton: I realize that, your Honor. I will try to clarify that.

The Court: I was interested in an answer to your question, that's the reason I made the comment.

Mr. Belton:

Q Mr. Moore, do you have a pool of employees who have worked on various jobs on a permanent basis who are now on the call board or who may be on the call board? A That is correct.

Q And do these employees have first recall to openings to those positions for which they held at a permanent time over a senior [1223] employee in terms of plant service who has never worked on the job? A Yes, by seniority. That is my definition of recall. For instance, if I can give you an example of that, say a laborer in the wood yard who has regressed to the call board, if a vacancy occurs because of sickness, vacation, or increased operations, if he is on the call board and he is the most senior of laid off laborers from the wood yard group, he would be the first one to be called or contacted to return to the wood yard.

Q Would the same be true, for example, with a back plugger No. 2 in the A paper mill? A Yes, sir.

Q The employee who worked the job before gets the first recall, right? A If he has been permanently assigned to that job, then we call them on the basis of seniority.

Q Plant, department, or job? [1224] A Well, that goes back to department—

Q Could we get an illustration so we can understand how it operates? Assuming you had two employees on the call board, one worked in the wood yard department as a chain operator and he has worked in the wood yard department ten years, worked on the chain operator's job for one year; the other employee works in the A paper mill department and he has worked that position of fourth hand and has been with the company five years and has worked the position of fourth hand four years, both of these employees are now on the call board, they are not actually working. They need someone to fill the fourth hand position and as between these two individuals—do you understand the illustration? A I'm following you so far.

Q As between these two individuals, who would be recalled under the system as it now operates? [1225] A If the vacancy occurs in the paper mill in the fourth hand classification, actually it would start at the bottom of the line of progression, the employee with the seniority from the paper mill department would be recalled to that classification. The employee from the wood yard who had never worked in the paper mill would have no recall right to that department.

* * *

Mr. Lowden:

Redirect Examination

[1249]

Q For an incumbent employee, that is employees who were employed in 1965, when did we waive high school educational requirements for those people? A In 1965, during the negotiations.

Q And they were offered to take the test without a high school education? A That is correct.

Q Since that time have we ever employed any people without a high school education and without passing the test? A No sir.

Q When we're talking about incumbent employees, are you talking about people who were there some time prior to when we waived the high school education? [1250] A 1965, November 1965.

Q In 1968 I believe we merged the lines of progression and if a man ended up in a merged line of progression could he go up that line of progression without a high school education and without passing the test just like other incumbent employees in that line of progression? A Yes, that is correct.

* * *

[1286] The Court: Will there be any evidence for the defendant union?

Mr. Woods: I am prepared to proceed, your Honor.

First of all, I want to offer, as I said before, the cross-examination of the witness Bryan, on deposition, by Mr. Ledford.

My copy of that deposition is missing a few pages. I believe it is Exhibit No. 32 — beginning on page 578, at line 6, and the balance of the page:

"Q The union proposed in the '65 negotiations that seniority be first by department, then by the plant, did it not? A There was a proposal in the '65 negotiations by the union, I can't quote it but it had to do with having first departmental [1287] "and then plant seniority.

"Q Well, if the company had agreed with the union to that proposal, would that have had the effect of eliminating

these various lines of progression? A To tell you the truth, I don't know what the effect of that would have been other than utter chaos in the mill. That was the wildest proposal in the whole agenda, perhaps, and I told them so.

"Q Well, did you discuss that proposal with them? A Very little.

"Q Well, did they tell you what they had in mind? A I don't believe they did. I can't say they didn't say something about it but I don't recall them [1288] "saying anything because we were not the least bit interested in that proposal. That would destroy our whole system of training and orderly progression and everything else.

"Q On page 14 of the plaintiffs' Exhibit 1, paragraph 1, 'in the fall of '65 the company agreed with the union to waive the high school education requirement for several departments in the case of incumbent Negro employees provided these Negro employees demonstrated sufficient aptitude for learning the work by qualifying on a pre-employment test used for entrance into these departments . . .'"

Mr. Woods: The question is repeated and over on the top of page 580, line 3:

[1289] "Q I just direct your attention to that paragraph and now the question: what steps had the union taken to assist in the opening of all lines of progression? A Well, there wasn't any proposal to open all lines of progression to Negro employees, they were already open to Negro employees.

"Q Well, what I'm really saying is to assist in getting the employees from one line of progression to the more skilled lines, just tell me what that paragraph means. A That paragraph means simply that there was a proposal

through the union presented to us in negotiations concerning the use of pre-employment tests, that we let incumbent Negro employees [1290] "transfer into the general and extra board jobs into the lines of progression leading off of that without making them meet the same criteria as it applied to outside applicants. They made a speech about how these people had worked with us a long time and couldn't we give them some consideration as opposed to people on the outside who never had worked for us."

Mr. Woods: On page 581 at line 14:

"Q Well, the union didn't have anything to do with the institution of or the composition of those tests given either to applicants or to employees, did it? A No, they didn't have anything to do with it except that earlier, as I mentioned, in that first [1291] "validation study I was told that they cooperated in getting people to help validate the tests."

Mr. Woods: And your Honor, turning next to page 582, beginning at line 3,

"Q And did you and the company take it upon yourselves the right to ignore seniority if in its opinion it feels that the employee lacks the ability? A Yes, sir.

"Q And the union can discuss the matter with you, can't they? A Oh, we would discuss it with them.

"Q But in the final analysis the company has reserved unto itself the right to make the decision, hasn't it? A About what, qualifications, promotions?

"Q Yes, sir. [1292] A Well, this is subject to the union contract and whatever is contained in that concerning that. It's therefore not the same as in an unorganized plant, no, sir."

Mr. Woods: And then after an exchange, and he doesn't want to talk about exactly what is in the contract without reference to it, we get down to page 583, line 18:

"Q Now, then, based on that . . ."

Mr. Woods: Section 10 of the contract—". . if you were considering a person for promotion and determined that they were of equal ability, the one with the seniority would obtain the promotion, would he not? A Again, I don't want to interpret the contract . . ."

Mr. Woods: Then, turning next to transcript [1293] page 593, the whole page, your Honor; and this is by Mr. Lowden:

"Q Subsequent to our company's move in the summer of 1964, did we begin complaints about tests, specifically, from a Mr. Joe P. Moody? A Yes.

"Q As a result of Mr. Moody's activities wasn't the question of testing Negro employees put on the agenda in the 1965 negotiations? A I presume it was because the part of the union agenda that related to this was signed by Joe P. Moody."

Mr. Woods: And then he simply asked him as a result of these discussions did they remove the requirement of a high school education as a qualification for incumbent [1294] employees who were able to pass the tests to go from one job to another, and the answer, in effect, was yes.

Those are all the portions of Mr. Bryan's deposition which the union defendant desires in evidence.

It is on the basis of that testimony, your Honor, that we would contend, that we seek a finding of fact, that the union attempted as early as the 1965 negotiations immediately following the effective date of the Civil Rights Act of 1964

to moderate or modify the seniority system at the plant and give more weight to plant seniority, in promotions and demotions in all lines of progression, and also sought by that the right to eliminate dual lines of progression within the departments, as we also sought, in effect, to moderate the use of tests for the older [1295] employees at the plant.

Your Honor, I will call as the union defendant's first witness, Mr. David Mills.

The Court: All right, sir. Before we proceed to that, may I inquire if any interested party desires to call attention to any of the testimony of Mr. Bryan alluded to by Mr. Woods as further explanatory or elucidating the testimony.

* * *

[1298] David Mills, having been first duly sworn to tell the truth, testified as follows:
Mr. Woods:

Direct Examination

* * *

Q What is your occupation, sir? A I am a maintenance employee at Albemarle Paper Company.

Q How long have you worked for Albemarle at Roanoke Rapids? A A little over sixteen years.

Q Are you a member of Halifax Local 425 of the United Papermarkers and Paperworkers? A Yes.

Q Directing your attention specifically from the period 1965 to present, have you held a local union office in local 425? A Yes, sir, I have.

[1299] Q Describe what offices at what time. A From January 1965 until approximately October 1st I was

vice-president, from October 1, 1965 to January 5 of 1971 I was president.

Q Mr. Mills, are you familiar with the provisions of the International Union Constitution which deal with strikes? A Yes, sir.

Q By local unions? A Yes, sir.

Q I hand you a document and I ask that it be marked for identification as Union Defendant Exhibit No. 3, the constitution of the United Papermakers and Paperworkers, AFL-CIO.

(International Union Constitution identified as Defendant Union's Exhibit No. 3.)

Mr. Woods: I am calling his attention, your Honor, specifically to page 53 [1300] which deals with strike procedures where a single local union is involved and where multiple local unions are involved. This is in the single local union situation and is governed by Section 3 at page 23.

Q Is the procedure required for local unions who want to go out on strike governed by Section 3 at page 23 of the International Constitution? A Yes, sir, it is.

Q While you were president of the local up to about 1969 did you have a corresponding provision in the local union bylaws? A No, sir, we did not.

Q However, in 1969 did the local adopt some new bylaws? A Yes, they did.

Q And in those bylaws did you specifically track the bylaws of the International with respect to a two-thirds majority vote by [1301] secret ballot for strikes? A Yes, sir.

Q Mr. Mills, did you participate in the 1965 negotiations while you were vice-president of the local union? A Yes, sir, I did.

Q Without going into them in any great detail, I hand you a document which is marked for identification as Union Exhibit No. 4. A Yes, sir.

Q Please tell the Court what that document is. A It is the union's proposal for contract changes for the negotiations of 1965. (Union's proposal of 1965 identified as Defendant Union's Exhibit No. 4.)

Mr. Woods:

Q Directing your attention to page 3 of that proposal, paragraph a at the top of the page. A Yes, sir.

[1302] Q Does that represent what the union was requesting with respect to Section 10 of the existing contract? A Yes, sir.

Q I notice the first reference is "temporary and permanent vacancies will be filled by employees with the greatest seniority, first by department, and second by plant, "was that proposal discussed with Mr. Bryan for the company? A Yes, sir.

Q What was his reaction? A He didn't seem to be very interested in this proposal and he objected very strenously.

Q Did he characterize his response in any way, that is sort of customary in bargaining? A I believe Mr. Bryan's reply was, "A big fat no," as he put it.

The Court: Did he say it would create [1303] chaos? A Yes, he said in effect that the company just could not live with a situation like this.

Mr. Woods:

Q And he said a big fat no to that proposal? A Yes, that is his answer.

Q What effect would have been the acceptance of that proposal or the maintenance of dual lines of progression within a single department? A Well, sir, it would have had a tendency to do away with dual lines of progression by promoting first by seniority within the department and second by plant seniority.

Q Now, at that time were there actually dual lines of progression within the various departments, some predominantly black and some predominantly white? A Yes, sir, there were.

[1304] Q Much has been said here, as you know, Mr. Mills, about the Moody agenda for the 1965 negotiations. At my request have you collected most, if not all, of these demands for changes in the contract and practices submitted to you prior to 1965 negotiations that were signed by Joe Moody? A Yes, sir.

Mr. Woods: I will ask the reporter to mark for identification as the Defendant Union's Exhibit No. 5 a three page letter addressed to Albemarle Paper Company dated August 17, 1965, with the typewritten signature of Joe P. Moody and various other typewritten signatures below.

(Letter dated August 17, 1965 to Albemarle Paper Company identified as Defendant Union's Exhibit No. 5.)

Mr. Woods:

Q I will ask you, Mr. Mills, to state if [1305] that was one of his demands submitted to the union as well as to the company on or about that day? A Yes, this is one of them.

(Letter signed by Joe P. Moody marked for identification as Defendant Union's Exhibit No. 6.)

Q I show you another document which has been marked for identification as Defendant Union's Exhibit No. 6 and ask you if this is another demand submitted by Moody to the union for presentation to the company? A Yes, it is.

Q Again referring to the year 1965? A Yes, sir.

(Multi-page letter signed by Joe P. Moody identified as Defendant Union's Exhibit No. 7.)

Mr. Woods:

[1306] Q I have asked the reporter to mark for identification as Union Exhibit No. 7 a multi-page exhibit consisting of various demands submitted by Moody to the company and the union prior to 1965 negotiations; is that more demands of Mr. Moody and his associates, that they asked the union to take up with the company. A Yes, it is.

Q Did the union in fact take up with the company Mr. Moody's agenda? A Yes, sir.

Q I believe Mr. Bryan has testified that there was a separate session on his demand. A Yes, sir, that's right.

Q Was Mr. Moody present at the time? A Yes, sir.

Q And was he permitted to argue and negotiate these demands? A Yes, sir.

[1307] Q And did the union assist him on some of them? A Yes, we did.

(Joe Moody agenda identified as Defendant Union Exhibit No. 8.)

Mr. Woods:

Q I show you another document which consists of two pages and is marked Union Defendant's Exhibit No. 8 which is headed "Joe Moody Agenda" and is in handwriting, and I ask you to state if you recognize that handwritting? A Yes, sir.

Q Whose handwriting is it? A It is Mr. Reavy Irby's handwriting.

Q And who is he? A He is the International representative from Richmond.

Q And does this memorandum in Irby's handwriting represent the company's responses or answers to the Moody agenda? [1308] A Yes, sir.

Mr. Woods: Your Honor, I offer into evidence Union Defendant's Exhibit Nos. 2 through 8 inclusive.

The Court: Very well, let them be received.

(Union Defendant's Exhibits 2 through 8 inclusive admitted in evidence.)

Mr. Woods:

I will ask the clerk to mark as Union Defendant's Exhibit No. 9 for identification the multi-page document headed "Union Agenda, UPP Local 425, 1968."

(Union Agenda, UPP Local 425, 1968, identified as Union Defendant's Exhibit No. 9.)

Mr. Woods:

Q I will ask the witness to state if that was the union's agenda for the negotiations during 1968? A Yes, sir, it is.

[1309] Q And whose handwriting appears on the agenda? A That is mine, sir.

Q And those notes were simply made as you went through the bargaining negotiations, is that right? A Yes, sir.

Q On this document, I call your attention to paragraph 7 at the bottom of page 1, Section 10, page 16, 10.1.1 etc., and continuing through all of page 2 dealing with Section 10 of the contract. A Yes, sir.

Q Are those the changes that the union proposed in 1968 in the seniority provisions of the contract? A Yes, sir, they are.

Q Going back, Mr. Mills, to the 1965 negotiations, after those negotiations were concluded did you receive a final offer for a new contract from the company? [1310] A Yes, sir.

Q What was the practice of the local union when you received such a final offer? A We read the proposals to the body and had a vote on it to either accept or to ratify the contract.

Q And what was the action of the local, were you present when it occurred? A No, sir. Mr. C. V. Bullock was.

Q Were you present when the body voted? A Yes, I was present.

Q What was the action of the body? A The body voted overwhelmingly to accept it.

Q Were there black members present at that time, to the best of your recollection? A Yes, sir.

Q Did you see any of them vote for the acceptance of the contract? A Well, I don't remember seeing anyone vote [1311] to turn it down, no, sir, in fact, the acceptance was so great they gave the union committee a standing ovation.

Q Back in the 1968 negotiations, what was the company's reaction to your proposal for further changes in paragraph 10 dealing with seniority and transfer? A Well, sir, they were not willing to accept our proposals as written, but they offered several counterproposals that were eventually accepted.

Q And among those counterproposals there was included the red circling that both Mr. Bryan and Mr. Moore referred to in their testimony, is that true? A Yes, sir.

Q Ultimately did the union committee take back the company's final offer including the proposals on seniority to the local union meeting in the same manner as was [1312] done in 1965? A Yes, sir.

Q Were you present? A Yes, sir.

Q I assume that you presided this time as president of the local? A Yes, sir.

Q Was there a vote on it? A Yes, sir, there was.

Q Can you tell us the approximate margin of approval or disapproval? A We had two votes on this. It was turned down by the body the first time and then we had a strike vote. They voted not to strike and we carried the proposal back to the body and voted by secret ballot and they voted approximately three to one to accept.

Q If I understand you correctly, first they voted to reject it, the company's offer? [1313] A Yes, sir.

Q Then you put a strike vote to them and they voted not to strike? A Yes, sir.

Q So then you put the company's offer to them on a secret ballot and they voted about three to one to accept it? A Yes, sir.

Q Now, Mr. Mills, Mr. Bryan and Mr. Moore have testified regarding the merger of the lines of progression which occurred in late 1967, in 1968, and some degree of contract negotiations in 1968, will you please tell us in your own words briefly, what the union's roll was in bringing about the merger of those lines of progression during that

period? A Well, some of these lines were merged in an agreement between the company and the union before the negotiations of 1968 and this was done in an attempt [1314] to reach some conciliation before the EEOC and we had tentatively agreed to some of these terms when the meeting was held between the company and the union. The company had these agreements written up as they wanted to present them to us and we agreed to the changes.

* * *

Mr. Woods:

Q Just to clarify your last answer, Mr. Mills, to the question about the union's role in the merger of the lines of progression, is it correct that the union representatives and company representatives met in conciliation under the [1315] auspices of the EEOC several times during '68—or rather '67 and early 1968? A Yes, sir.

Q And do I understand you to mean that at one of the conferences with the EEOC the union and the company agreed to revise certain lines of progression? A Yes, sir.

Q And then the company wrote it out and presented it to the union and the union accepted it? A Yes, sir.

Q And were there other lines of progression discussed for merger at or about that time, the time of the 1968 negotiations? A Yes, sir.

Mr. Woods: Your Honor, it is already a stipulation of fact, the joint Exhibit 1 showing the precise lines of progression which were merged.

[1316] The Court: Yes, sir, I recall.

Mr. Woods:

Q In your negotiations with the company and the contract that you had with the company, has there ever been a

provision governing the flow of employees from the extra board to the various departments and lines of progression? A No, sir, there has not.

Q Has the union attempted to negotiate such a provision of one type or another? A Yes, sir. We have tried to fill all jobs in the lines of progression from the call board.

Q I assume everyone here is aware, including yourself, sir, that North Carolina is what is called a right-to-work state? A Yes, sir.

Q Has the union ever had any control over the company's hiring policy or qualifications for hiring? A No, sir.

[1317] Q Are those unilaterally established by the company? A Yes, sir, they are.

Q Have there ever been any provisions in the contract requiring the company to post vacancies as they occur? A No, sir. We attempted that in 1968 negotiations but we were not successful.

Q And you heard Mr. Bryan the other day explain his position on that question, did you not? A Yes, sir.

Q And that was the position he gave you during the negotiations? A Yes, sir.

Q A plaintiff's witness named James A. Jones testified the other day about having been involved in an arbitration, in connection with a grievance he took to the union, do you recall that [1318] arbitration? A Yes, sir.

Q What was that about? A It was over a disciplinary suspension of Mr. Jones for his allegedly refusing to come to work when instructed by the watchman, I believe it was.

Q On that kind of a grievance that didn't involve a discharge, did it, sir? A No, sir.

Q Is it the union practice to take it up through each step of the grievance procedure described in the contract and being unable to get a satisfactory solution, then you request arbitration? A Yes, sir.

Q Were you present at the arbitration? A Yes, sir.

Q And was there an International representative present also who assisted in presenting the matter to the arbitrator? [1319] A Yes, sir.

Q Did you win the arbitration? A No, sir, we did not.

Q While we are on the subject of arbitration, Mr. Mills, did you also take a grievance of Joseph P. Moody to arbitration in 1967? A Yes, sir, we did.

Q What was the origin of that grievance? A I believe it was four and a half days suspension of Mr. Moody for insubordination.

Q I believe Mr. Moore referred to this when he was giving the personnel record for Mr. Moody during his testimony, is that true? A Yes, sir, he did.

(Four page document dated July 27, 1967 signed by Nathan Caton, identified as Defendant Union's Exhibit No. 10.)

[1320] Mr. Woods:

Q I show you a document, Mr. Mills, that has been marked for identification as Defendant Union's Exhibit No. 10 which is a four page document bearing the date of July 27, 1967 and bearing the signature of the arbitrator, Mr. Nathan Caton, and I ask you to state what that is. A That, sir, is the arbitrator's decision on the Joe P. Moody grievance.

Q The decision speaks for itself, of course, Mr. Mills, but did the arbitrator deny the grievance? A Yes, sir, he did.

* * *

[1322] The Court: What do you seek to show, Mr. Woods, by going into the facts that motivated the arbitrator to reach this decision?

Mr. Woods: I seek to show approximately three things, your Honor. First, I seek to show what counsel has anticipated, that the union was vigorous and alert in defending the rights of its membership, black and white alike, even to the extent of going through the expense and effort of an arbitration.

* * *

[1326] Mr. Woods:

Q Mr. Mills, the plaintiff's witness by the name of Ethoria Jones testified regarding two testing letters he claims [1327] he had received and several conversations or at least a conversation that he had with you about them, do you know Mr. Ethoria Jones? A Yes, sir, I do.

Q Do you recall his testimony on direct? A Partly.

Q Let me put it to you this way, will you give us your best recollection of what conversation you had with Mr. Jones about these testing letters? A Well, back some time in 1965, I believe it was, Mr. Jones got up at a regular union meeting and stated that he had taken this test and had passed it and later Mr. Jones and several other black employees and union members claimed that Mr. Jordan, the chief watchman, I call him, I guess that's his position, had told them that if they took this test and passed it that they would have to [1328] give up their job that they held, their regular jobs, and go on call and wait until these other jobs came open.

We took this up with the company at a later date but in the meantime Mr. Jones sent me word by Jeremiah Webb

that the company had claimed that he took the wrong test and would have to take it over. So I wanted to check and I checked with the personnel department and they said they had no record of his having ever taken the test. So I related this to Webb, Jeremiah Webb, and he later came back to me and told me that Jones, Ethoria Jones, took the test with two of the Harding boys. So I went back and checked with the Harding boys, one of them, C. I. Harding, and asked him if Jones had taken the test at the same time he did, and he said that he did [1329] not. So this message I sent back to Ethoria Jones.

Later he came back with a story that he took the test in the pulp mill's superintendent's office, which this I also checked out, and they assured me, the company did, that there had never been any tests administered in the pulp mill's superintendent's office.

Then Mr. Jones sent me word that he had a letter from the company indicating that he had in fact taken and passed the test. And at this time I told him if he would get the letter to me, that I would go in and clean the personnel department out, if your Honor please, are the words that I used, and he later told me that he hadn't been able to locate the letter, that he had it in his file but he must have misplaced [1330] it somewhere and he never did produce it. I came to the conclusion that Mr. Jones hadn't taken the test. He had led me down several blind alleys. I never found any concrete evidence of his having taken the test at all.

Q Now, another employee by the name of Henry Mason I believe he testified he was first employed by the company in 1936 or 1937 and he was telling us of his desire to transfer from his then current job back to the maintenance department where he had been employed much earlier in the

company's career. Do you recall ever having a discussion with him, Mr. Mason, about the proposed transfer to maintenance? A Yes, sir.

Q Would you tell us about that. A Well, the first I heard about that, was [1331] Mr. Masons' shop steward, Mr. W. C. Rivers, he came to me and told me that Mason wanted to transfer back into the maintenance department. I told him that I would do what I could and Mr. Mason came to see me. He asked me the same thing and I told him that I would see what I could do for him.

So I went to the personnel department and they told me if he wanted to transfer to come by the office and pick up a transfer form and fill it out requesting a transfer. This message I carried back to Mr. Mason and he told me that he would get the form. A little later I asked him if he had done this and he said yes, but he couldn't fill it out, so I told him if he would bring it to me I would fill it out for him. He never did bring it. Later when I asked [1332] him about it again he told me that he didn't sign any papers to get out of maintenance and he wasn't going to sign any to get back in and that was the end of that.

Q Mr. Mills, there has been a lot of testimony in the record about the power plant staffing some time in 1965 and the resulting curtailment of the boiler room, steam and bark boiler operations, without reworking all that material that is already in the record, I ask you just this one question.

Was any grievance ever presented to you by any of the black employees involved in the curtailment operations— A No, sir.

Q —seeking a transfer into the power department? A No, sir, there was not.

Q And did you in behalf of the union subsequently have something to do between contracts [1333] with negotiating

with the company for a revised line of progression to give the boiler department employees, including Negro employees, a higher end of the line progression rate to aspire to? A Yes, sir, we did, but mainly to provide more work for these people who had been laid off and/or moved back to the call board from the old coal boiler. We made an agreement with the company to put two of the incumbent white utility men back on the call board and open this job up to some of the employees from the old boiler room and we put this job then in the line of progression with the old coal boilers which would allow these people to work as a utility man at the power boiler and work on up to boiler operator in the old boiler.

Q That was a relatively high-paying job? [1334] A Yes, sir.

* * *

Cross-Examination

Mr. Belton:

[1338] * * *

Q My question was, Mr. Mills, at the time that it came to your attention that some black employees who were in the boiler room and their job opportunities were being affected by the installation of the power plant, did it also come to your attention that they felt that their job opporunities were being affected because they were black. A Not that I recall.

Q I think that you have identified, Mr. Mills, some exhibits, Nos. 7, 6, you have identified several exhibits, Mr. [1339] Mills, that you said were presented to you by Mr. Moody and other black employees at the plant, is that correct? A Yes, sir.

Q And these were prior to the 1965 contract negotiations? A Yes, sir.

Q Did it come to your attention, Mr. Mills, at the time that these were presented to you that the employees on whose behalf they were presented were contending that they were not being afforded equal job opportunities because they were black? A I have read that in the Joe P. Moody agenda. But I believe you referred to a grievance. We took these complaints up with the company as a matter of negotiations in 1965, not as a matter of going through the grievance procedure. We took it up in negotiations.

Q I was asking you whether or not these [1340] complaints were predicated on or came to your attention that they were complaining that they felt as black men they were not getting equal opportunities with the company? A I guess you could say that, sir.

Q Did you investigate to see whether or not they were being discriminated against? Did you investigate the race aspect of these complaints? A No. We have never so far as I know in the local union negotiated anything on a racial basis. We have never gone out and asked for anything for a black person or a white person, we have asked for it as members of our local union.

[1366] * * *

Mr. Woods: Redirect Examination:

Q Mr. Mills, I'm not quite sure I understood one of your answers on cross-examination by Mr. Belton, about trying to negotiate special provisions for Negro employees. Did the union while you were negotiating for it in '65 to '68 ever make any contract proposals which applied to blacks only or whites only? A No, sir, we never have.

Q Did you ever negotiate from the premise of whether one group of employees was black or white? A No, sir.

Q And when you consider complaints of individual members of the union or employees [1367] in the unit, did you ever distinguish between black and white?

Objection.

A No, sir, nothing as far back as I have been able to search the records of the union do they indicate in any place what a person's race is.

Q Mr. Mills, Mr. Lowden asked you a question about the proprosal, what you were really proposing in 1965 was still not plant seniority but departmental seniority was the controlling condition for moving within a line of progression and if adopted by the company would have eliminated dual lines of progression, do you remember the question? A Yes, sir.

Q Now, under both the '65 and the '68 contracts, I believe the company reserved to itself the right to determine, to have [1368] a final say on whether anybody transferred, is that correct? A Yes, sir.

Q So as it stands today, regardless of what the union's position is, a man doesn't get transferred until the company says so, is that right? A That's right.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILSON DIVISION

Civil Action No. 989

JOSEPH P. MOODY, ET AL.,
Plaintiffs,

v.

ALBEMARLE PAPER COMPANY, ET AL.,
Defendants.

Proceedings before the HONORABLE F. T. DUPREE, JR., Judge, Presiding, United States District Court for the Eastern District of North Carolina, Wilson Division, Courtroom No. 1, Raleigh, North Carolina commencing at or about the hour of 9:00 o'clock a.m., August 4, 1971.

APPEARANCES:
(As heretofore noted)

* * *

[1378] WARREN DAVIS, having been first duly sworn to tell the truth, testified as follows:

Direct Examination

Mr. Woods:

* * *

[1399] Mr. Woods:

Q Mr. Davis, what is the whole source of income or revenue of the local union No. 425?

Mr. Chambers: Objection.

Overruled.

Mr. Chambers: Your Honor, I don't see how that has any relevance.

The Court: Yes, sir, I'm inclined to agree. He can answer it and I can't see any harm done.

A It is the dues from the local members.

Mr. Woods:

[1400] Q What are those dues? A Five dollars per month.

Q And I take it that all of the employees in the bargaining unit are not members of the union? A That is correct.

Q Then there are some Negro employees who are members of the union? A Yes, sir.

Q And there are some Negro employees who are not members of the union? A Yes, sir.

Q Is the same thing true of the white employees? A Yes, sir.

Q At the present time what is the approximate value of the financial assets of the local union?

[1403] * * *

Q Can you answer my last question? A The assets are less than $20,000.

* * *

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Supreme Court, U.S.
FILED
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APPENDIX

In the Supreme Court of the United States

OCTOBER TERM 1974

No. 74-389
No. 74-428

ALBEMARLE PAPER CO., *Petitioner*

v.

JOSEPH P. MOODY, ET AL.

HALIFAX LOCAL 425, PAPERMAKERS AND PAPERWORKERS, *Petitioner*

v.

JOSEPH P. MOODY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONS FOR WRITS OF CERTIORARI FILED OCTOBER 7, 1974 AND OCTOBER 15, 1974 CERTIORARI GRANTED DECEMBER 16, 1974

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1974

No. 74-389

No. 74-428

ALBERMARLE PAPER CO., *Petitioner*

v.

JOSEPH P. MOODY, ET AL., *Respondents*

HALIFAX LOCAL 425, PAPERMAKERS AND PAPERWORKERS, *Petitioner*

v.

JOSEPH P. MOODY, ET AL., *Respondents*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PLAINTIFFS' EXHIBIT NO. 1

[Before the Equal Employment Opportunity Commission]

[Case No. AT-6-6-276 Filed May 9, 1966]

To: Equal Employment Opportunity Commission

COMPLAINT OF UNFAIR EMPLOYMENT PRACTICES UNDER THE 1964 CIVIL RIGHTS ACT, TITLE VII

Date: Feb. 17, 1966

My name is Joe P. Moody. I am a Negro citizen of the United States and a resident of North Carolina. My address is Rte. 1, Box 128, Roanoke Rapids, N. C. My complaint is against Halifax Local No. 425 AFL-CIO whose address is ..... I applied for work with the above named employer on ....., and was refused work on ..... I applied for a position as a ..... My qualifications for the position are: (State education, training and/or experience.) I received a primary education and have 14 years of experience Albermarle Paper Mfg. Co.

I think that I was refused work because of my race or color. (State briefly the circumstances and/or reasons upon which the complaint is based. Such things as known, stated or written racial employment policies, either total or partial, can be included.)

The above named union, which is a bargaining agency for most of the employees in the Albemarle Paper Mfg. Co., including myself is guilty of discriminating against Negroes in upgraded employment. According to the guidelines of progression in Labor Management Agreement, Halifax Local No. 425 discriminates against Negroes in progression of policy making staff. There are no Negroes on the negotiating staff. Negroes are not protected by the union

in upgraded employment according to seniority in that no Negroes have been placed in any position according to Guidelines, page 16, entitled "Seniority."

We have been refused redress of grievances by union management.

1. Negroes are not permitted in meetings where negotiations of grievances are in question.

2. During incliment weather, Negroes have to crawl under flat cars without proper equipment to protect our bodies. Whites are not required to do this and they are furnished adequate clothing by the paper mill.

The union conspires with the company to discriminate against Negroes.

Negroes have been refused copies of the new wage agreement by the union and are paid salaries below that of Whites performing the same type duties. For instance: Negroes must perform any and all jobs requested of them, including operating bulldozers, repairing cranes, etc., which are jobs that pay up to $3.00 per hour. We are classified and paid as laborers of $2.39 per hour.

/s/ Joe P. Moody
Signature

[Jurat omitted in printing]

[Before the Equal Employment Opportunity Commission]

[Case No. AT-6-6-277]

To: Equal Employment Opportunity Commission

COMPLAINT OF UNFAIR EMPLOYMENT PRACTICES UNDER THE 1964 CIVIL RIGHTS ACT, TITLE VII

Date: Feb. 17, 1966

My name is Joe P. Moody Age: ..... I am a Negro citizen of the United States and a resident of North Carolina. My address is Rte. 1, Box 128, Roanoke Rapids, N. C. My complaint is against Albemarle Paper Mfg. Co., Inc., whose address is Roanoke Rapids, North Carolina. I applied for work with the above named employer on ....., and was refused work on ..... I applied for a position as a ..... My qualifications for the position are: (State education, training, and/or experience.) I received a primary education and have 14 years of experience with the above named company.

I think that I was refused work because of my race or color. (State briefly the circumstances and/or reasons upon which the complaint is based. Such things as known, stated or written racial employment policies, either total or partial, can be included.)

I have been on my present job for twelve years. No. 1 chipper has had a promotion within a certain area. Whites have been hired and placed in positions above me. Also one Negro.

I am forced to repair chains, which is a mechanics job, at a salary of $3.00 per hour to $3.12 per hour, and my salary range is from $2.36 to $2.42 per hour. In the light of these facts, Halifax Local No. 425 is discriminating

against Negroes in employment, according to page 16 of the Guidelines.

/s/ Joe P. Moody
Signature

[Jurat omitted in printing]

[Before the Equal Employment Opportunity Commission]

[Case No. AT-6-6-283]

To: Equal Employment Opportunity Commission

COMPLAINT OF UNFAIR EMPLOYMENT PRACTICES UNDER THE 1964 CIVIL RIGHTS ACT, TITLE VII

Date: Feb. 17, 1966

My Name is Arthur Mitchell, Age: ..... I am a Negro citizen of the United States and a resident of North Carolina. My address is Post Office Box 116, Graysburg, N. C. My complaint is against Albemarle Paper Mfg. Co., Inc., whose address is Roanoke Rapids, North Carolina. I applied for work with the above named employer on ....., and was refused work on ..... I applied for a position as a ..... My qualifications for the position are: (State education, training, and/or experience.) I received a primary education and have 44 years of experience as a laborer (2nd helper Stockroom, keeping stock for machine no. 1) with the above named company.

I think that I was refused work because of my race or color. (State briefly the circumstances and/or reasons upon which the complaint is based. Such things as known, stated or written racial employment policies, either total or partial, can be included.)

After 44 years of service with the Albemarle Paper Mfg. Co., I was released from my job Sunday, Feb. 13, 1966, at 3:00 p.m., without compensation, only to work when called. In this position I lose all seniority and fringe benefits. Salary for Stockroom 2nd helper is from $2.58 to 2.70 per hour. I was listed as a laborer at $2.39 per hour. I was placed on "Call Board" meaning, part time work, if needed. As a results, I lose my departmental seniority and fringe

benefits and all persons on call are the first to be laid off regardless of seniority. I also believe that departmental progression is discriminating by United Papermakers and Paperworkers, Local no. 425 AFL-CIO.

In that Negroes are relegated to certain departments and are not permitted on basis of seniority to be promoted to better jobs in other departments, I believe that I was removed from my place of employment and replaced by White because of my race and color.

/s/ Arthur Mitchell
Signature

[Jurat omitted in printing]

[Before the Equal Employment Opportunity Commission]

[Case No. AT-6-6-281]

To: Equal Employment Opportunity Commission

COMPLAINT OF UNFAIR EMPLOYMENT PRACTICES UNDER THE 1964 CIVIL RIGHTS ACT, TITLE VII

Date: February 17, 1966

My name is Henry Hill. I am a Negro citizen of the United States and a resident of North Carolina. My address is 1944 Carter Street, Roanoke Rapids, N. C. My complaint is against Albemarle Paper Mfg. Co., Inc., whose address is Roanoke Rapids, N. C. I applied for work with the above named employer on ....., and was refused work on Dismissed on Feb. 14, 1966. I applied for a position as a ..... My qualifications for the position are: (State education, training and/or experience.) 3rd Grade education, and 18 years 4 months, valve puller for 14 years.

I think that I was refused work because of my race or color. (State briefly the circumstances and/or reasons upon which the complaint is based. Such things as known, stated or written racial employment policies, either total or partial can be included.)

On Monday February 14, 1966, I was removed from my job as valve puller where I had been employed for 14 years. I had seniority over the 2 white men working in my department. Most white men are trained on any and all jobs, regardless of educational level at the rate of about 3 months training. I was placed on what is called the "call board"; meaning part-time work, if needed. As a result, I loose my departmental seniority and fringe benefits, and persons on the call board are the first to be laid off—regardless of

seniority. I also believe that departmental progression is discriminating by United Papermakers and Paperworkers, local No. 425 AFL-CIO.

In that Negroes are relegated to certain departments, and are not permitted, on the basis of seniority, to be promoted to better jobs in other departments, I believe that I was removed from my place of employment and replaced by white men because of my race and color.

/s/ Henry Hill
Signature

[Jurat omitted in printing]

[Before the Equal Employment Opportunity Commission]

[Case No. AT-6-6-275]

To: Equal Employment Opportunity Commission

COMPLAINT OF UNFAIR EMPLOYMENT PRACTICES UNDER THE 1964 CIVIL RIGHTS ACT, TITLE VII

Date: Feb. 17, 1966

My name is Theodore Daniels, Age: 33. I am a Negro citizen of the United States and a resident of North Carolina. My address is Rte. 2, Box 439, Roanoke Rapids. My complaint is against Halifax Local No. 425 AFL-CIO, whose address is Roanoke Rapids, North Carolina. I applied for work with the above named employer on ....., and was refused work on ..... I applied for a position as a ..... My qualifications for the position are: (State education, training, and/or experience.) I completed the 10th grade and have eleven years of experience with the Albemarle Paper Mfg. Co.

I think that I was refused work because of my race or color. (State briefly the circumstances and/or reasons upon which the complaint is based. Such things as known, stated or written racial employment policies, either total or partial, can be included.)

The above named union, which is a bargaining agency for most of the employees in the Albemarle Paper Mfg. Co., including myself is guilty of discriminating against Negroes in upgraded employment. According to the guidelines of progression in Labor Management Agreement, Halifax Local No. 425 discriminates against Negroes in progression of policy making staff. There are no Negroes on the negotiating staff. Negroes are not protected by the union in upgraded employment according to seniority in that no

Negroes have been placed in any position according to Guidelines, page 16, entitled "Seniority."

1. We have been refused redress of grievances by union management.

Negroes are not permitted in meetings where negotiations of grievances are in question.

2. During incliment weather, Negroes have to crawl under flat cars without proper equipment to protect our bodies. Whites are not required to do this and they are furnished adequate clothing by the paper mill.

3. The union conspires with the company to discriminate against Negroes.

4. Negroes have been refused copies of the new wage agreement by the union and are paid salaries below that of Whites performing the same type duties. For instance: Negroes must perform any and all jobs requested of them, including operating bulldozers, repairing cranes, etc., which are jobs that pay up to $3.00 per hour. We are classified and paid as laborers of $2.39 per hour.

/s/ Theodore Daniels
Signature

[Jurat omitted in printing]

PLAINTIFFS' EXHIBIT NO. 5

(Affidavit of Joe P. Moody, et al., February 17, 1966)

* * *

General Patterns of Racial Discrimination As Practiced by the Albemarle Manufacturing Paper Company, Inc., and Halifax Local 425 AFL-CIO

I. Organizational Discrimination.

A. The above union and company have organized the factory in departments with seniority only in the unit in which you work. As a result, Negroes are relegated to a particular department and do not have seniority in any other department in the factory—usually menial jobs.

B. Since July 2nd, 1965, one Negro has been placed in a few previously all white departments, see enclosed labor management agreement.

II. Hiring Practices—The unreasonable tests that are being administered to Negroes, 133 questions, require 100 correct answers for passing—other tests, perhaps administered to other white persons consist of 50 questions, requiring 18 for passing. The 3rd test has the same requirements. It is believed that these tests are discriminatory in practice. Secondly, Negroes with a number of years of seniority are required to take the same tests, if they are to be promoted to other jobs. White people are not required to take the test for seniority promotions. And, if Negroes take the test, even if they have worked 40 or 50 years for the company, and pass, they will lose their seniority if they enter another department at the same company. Most of the 90 Negroes hired on all levels at the plant are in positions of laborers or utility men, which is the lowest paying level in

the factory. Even though they perform any and all duties such as mechanics, machine operator, repairmen and etc. without pay.

III. Discharging Practices of Discrimination.

A. The company and union have policies of placing Negro employees on what is known as 'Call-board.' This is a part-time position where you are called back to work, if you are needed. As a result of losing regular employment, Negroes have lost up to 44 years of seniority and all fringe benefits due them as a results of their long record of employment. When there are permanent lay offs, the persons in the above position are the 1st to be laid off. As a result, a man with 44 years of seniority, may be replaced with a man who has 6 months of seniority. We believe this to be gross discrimination on the part of the part of the union and management, as mentioned above.

B. Negroes are relegated to menial positions in the factory with less pay and and opportunities for seniority advancement in the plant. To my knowledge no Negroes have been promoted on the seniority plan according to the agreement of progressions, see attached guidelines.

C. Out of approximately 650 persons, more or less, there are less than 100 Negroes employed in the plant. Ratio of population in Halifax County, Negro, 56%, white, 44%. Many of the departments are totally segregated, including office, staff and management, technicians, laboratory workers and supervisory staff.

D. Negro part-time workers have fewer working hours than whites, and many of the older Negro employees are being placed from regular to part-time employment.

We believe that the gross discrimination is due to race and color.

We, the undersigned, being citizens of the County of Halifax, in the State of North Carolina, do certify that the foregone statement is true to the best of our beliefs.

/s/ Joe P. Moody

/s/ Arthur Mitchell

/s/ Theodore Daniels

Signatures

[Jurat Omitted in Printing]

PLAINTIFFS' EXHIBIT NO. 14

Labor Agreement

Between

Roanoke Rapids Division, Albermarle Paper Mfg. Co., Inc.

and

United Papermakers and Paperworkers, AFL-CIO

and

Halifax Local No. 425

United Papermakers and Paperworkers

Roanoke Rapids, North Carolina

September 18, 1965-September 15, 1968

* * *

Section 10

Seniority

10.1.1 If employees are to be promoted or demoted, the Management shall take into consideration seniority and ability and when all the factors that constitute ability are relatively equal, then seniority in keeping with established lines of progression within a given department (as shown on attached Appendix F) shall prevail.

10.1.2 In those cases in which an employee declines in writing to accept a job advancement he shall by so doing change his seniority to the lowest seniority standing among the employees rated in that particular job in that particular department. An employee who is offered the chance to sign a statement declining and refuses to sign the statement but nevertheless declines will be considered to have declined in writing.

10.1.3 In cases of permanent promotions or demotions in a department in which seniority is not followed the Local Union President will be notified. In case of permanent promotions in which a suitable employee does not exist within a department one may be selected by the Company from another department after discussion of the matter with the Union Committee for the first department.

10.1.4 An employee promoted to a permanent supervisory vacancy in his own department will accumulate departmental seniority while acting as a supervisor in that department for a period not to exceed six (6) months. At the end of six month period the employee will then become a permanent supervisor or placed back to his former position, unless otherwise agreed by mutual agreement between the Company and the local Union.

10.2 Employees who wish to transfer from one department (or line of progression) to another may file through their foreman with the Personnel Department of the Company written application stating the department (or line of progression) and the job therein to which he wishes to be transferred. The decision of the Company in granting or denying such request for transfer is to be final. However, when an employee transfers from one department (or line of progression) to another upon his own request, his seniority in the department (and line of progression) left shall cease immediately unless within thirty (30) days from the date of such transfer the health or physical condition of such employee makes it advisable to transfer him back to the department (or line of progression) left. Where the transfer is effected at the request of the Company, his seniority in the department (or line of progression) left shall be retained for a period of six months from date of transfer.

10.3 Definitions—Job, Department, Plant Seniority

For the purposes of this Agreement there shall be three (3) types of seniority: job seniority, department seniority and plant seniority.

Job seniority is defined as total length of continuous service in a job classification; seniority in a higher job(s) in the same line of progression shall count toward job seniority in lower job(s) in said line of progression.

Department seniority is defined as length of continuous service in one of the departments listed in Appendix F.

Plant seniority is defined as length of continuous service from most recent date of employment.

10.4.1 Vacancies (including increases in complement), and reductions (including curtailments, and decreases in complement) calling for promotions, or demotions, as noted in 10.1.1 will be practiced as follows:

10.4.2 When the vacancy or reduction is expected to continue for a period of more than two (2) weeks, job seniority in accordance with provisions of 10.1.1 will apply across all shifts of the line of progression. Employees will be laid off and rehired from the bottom job of a line of progression, in accordance with this provision.

When applying this paragraph 10.4.2 the Company shall have three days in which to make the move.

10.4.3 When the vacancy or reduction is expected to continue for two (2) weeks or less, job seniority in accordance with provisions of 10.1.1 will apply within the individual shifts of the line of progression. Employees will be laid off and rehired from the bottom job of a line of progression, in accordance with this provision.

10.4.4 When the company needs an employee for a job advancement for two (2) weeks or less, an employee will

normally be promoted within the shift on which the vacancy occurs, but when there is no qualified employee available on the shift in which the vacancy occurs, the Company may require the available qualified employee with the highest seniority to take the job advancement. In such situations of promoting across shifts for two (2) weeks or less paragraph 10.1.2 shall not apply to employees who refuse a job advancement other than such available qualified employee with the highest seniority.

10.5 It is agreed that the plan for the progression of employees in the Maintenance Department shall be as provided in Appendix C attached hereto and a part of this Agreement.

10.6 To maintain their rehiring rights, employees who are laid off because of lack of work must notify the Company in writing once in each thirty (30) days following date of layoff, giving their current address and signifying their continued interest in returning to work for the Company. The failure of an employee to comply with the above provision within the time limit specified shall void his rehiring rights. When employees are laid off, they will be advised of this provision. Employees being recalled to work shall be notified by certified mail and must return to work within ten (10) days from date of such notice unless an extension of time is agreed upon. A copy of said notification shall also be sent to the Union.

10.7 In applying 10.4.2 an employee who has bypassed another employee(s) will be deemed to have one day more seniority than the by-passed employee(s).

10.8 If the Company makes an error in applying the provisions of this Section with regard to layoffs, recalls, promotions, demotions, transfers, the Company shall not be liable for any payment to an employee as correction or

compensation for such error for such period of time from the time the employee or the Union knew or was aware of the error until he or the Union brings the error to the attention of the Company.

10.9.1 Job seniority shall be lost and all rights attributable to it forfeited by:

a. Transfer to another line of progression which extends beyond periods specified in 10.2 above.

b. Transfer to another department which extends beyond periods specified in 10.2 above.

c. Separation initiated by employee which shall be deemed to include resignation and retirement.

d. Discharge.

e. Absence due either to layoff or disability or both, for a period equal to his plant seniority at the time such absence began, but in no event shall an employee retain seniority if absent in excess of two years.

f. Failure to comply with Section 10.6.

10.9.2 Department seniority shall be lost and all rights attributable to it forfeited by: (b) through (f) of paragraph 10.9.1.

10.9.3 Plant seniority shall be lost and all rights under this Agreement forfeited by (c) through (f) of paragraph 10.9.1.

10.9.4 During the first continuous sixty days of lay-off an employee's seniority shall continue to increase and if he returns to work within this period, he shall be reinstated without loss of seniority. During such period he shall not receive holiday pay or other benefits unless he is recalled within ten calendar days from the date of lay-off.

* * *

PLAINTIFFS' EXHIBIT NO. 15

Labor Agreement
Between
Roanoke Rapids Division, Albemarle Paper Mfg. Co., Inc.
and
United Papermakers and Paperworkers, AFL-CIO
and
Halifax Local No. 425
United Papermakers and Paperworkers
Roanoke Rapids, North Carolina
September 23, 1968-September 15, 1971

* * *

Section 10

Seniority

10.1.1 If employees are promoted or demoted, the Management shall take into consideration seniority and ability and when all the factors that constitute ability are relatively equal, then seniority in keeping with established lines of progression within a given department (as shown on attached Appendix F) shall prevail.

10.1.2 An employee shall not be permitted to refuse a promotion without the Company's permission. An employee may be "frozen" only by the Company. If an employee is permitted by the Company to refuse a promotion, he shall have his seniority changed to the lowest seniority standing among the employees in that particular job in that particular department.

10.1.3 In cases of permanent promotions or demotions in a department in which seniority is not followed the Local Union President will be notified. In case of permanent promotions in which a suitable employee does not exist within a department one may be selected by the Company from

another department after discussion of the matter with the Union Committee for the first department.

10.1.4 An employee promoted to a permanent job outside of the bargaining unit whom the Company decides to return to the bargaining unit within six (6) months shall, if so returned by the Company, have his job, department and plant seniority restored with additional credit on all three types of seniority for the time spent outside the bargaining unit. The six (6) month period may be extended by mutual agreement between the Company and the Local Union.

10.2.1 Employees who wish to transfer from one department (or line of progression) to another may file through their foreman with the Personnel Department of the Company written application stating the department (or line of progression) and the job therein to which he wishes to be transferred. The decision of the Company in granting or denying such request for transfer is to be final. However, when an employee transfers from one department (or line of progression) to another upon his own request, his seniority in the department (and line of progression) left shall cease immediately unless within thirty (30) days from the date of such transfer the health or physical condition of such employee makes it advisable to transfer him back to the department (or line of progression) left. Where the transfer is effected at the request of the Company, his seniority in the department (or line of progression) left shall be retained for a period of six months from date of transfer.

10.2.2 When the Company grants a transfer as described in 10.2.1, then the transferred employee will be vested with department and job seniority equal to that held in his last job or equal to that held in the lowest job in the line of progression from which transferred.

10.2.3 When the Company grants such a transfer as described in 10.2.1, then the transferred employee will be paid his present rate if higher than the rate of the job to which transferred until such time as the employee progresses to a job in the new line of progression which pays as much or more than his rate in his last classification in his former line of progression. An employee who is permitted to carry a higher rate to another department or line of progression shall have such rate reduced to the rate of the job to which he is transferred if the employee is deemed at the time a "permanent" vacancy occurs in the next higher job in the new line of progression to be unqualified for such job, or with the Company's approval declines a promotion to such a job. Such an employee shall not lose his "red circle" rate if deemed unqualified and the sole reason for his lack of qualification is a determination by the Company that he has not had sufficient time in the new line of progression to obtain the training and experience necessary for promotion. In applying Section 10.2.1, if the Company decides to fill a vacancy by transferring an employee who has made application pursuant to the foregoing provisions and there are on file more than one such application for the job opening, then the Company will offer the transfer to the senior qualified employee making application.

10.3 Definitions—Job, Department, Plant Seniority

For the purposes of this Agreement there shall be three (3) types of seniority: job seniority, department seniority and plant seniority.

Job seniority is defined as total length of continuous service in a job classification; seniority in a higher job(s) in the same line of progression shall count toward job seniority in lower job(s) in said line of progression.

Department seniority is defined as length of continuous service in one of the departments listed in Appendix F.

Plant seniority is defined as length of continuous service from most recent date of employment.

10.4.1 Vacancies (including increases in complement) and reductions (including curtailments and decreases in complement) calling for promotions, or demotions, as noted in 10.1.1 will be practiced as follows:

10.4.2 When the vacancy or reduction is expected to continue for a period of more than two (2) weeks, job seniority in accordance with provisions of 10.1.1 will apply across all shifts of the line of progression. Employees will be laid off and rehired from the bottom job of a line of progression, in accordance with this provision.

When applying this paragraph 10.4.2, the Company shall have three (3) days in which to make the move.

10.4.3 When the vacancy or reduction is expected to continue for two (2) weeks or less, job seniority in accordance with provisions of 10.1.1 will apply within the individual shifts of the line of progression. Employees will be laid off and rehired from the bottom job of a line of progression in accordance with this provision. The provisions of 10.1.1 will also apply within the individual shifts of the line of progression to the filling of vacancies caused by employee(s) being on vacation even though such vacation may extend longer than two (2) weeks.

10.4.4 When the company needs an employee for a job advancement for two (2) weeks or less, an employee will normally be promoted within the shift on which the vacancy occurs, but when there is no qualified employee available on the shift in which the vacancy occurs, the Company may require the available qualified employee with the highest seniority to take the job advancement. In such situations of promoting across shifts for two (2) weeks or less paragraph 10.1.2 shall not apply to employees who refuse a job

advancement other than such available qualified employee with the highest seniority.

10.5 It is agreed that the plan for the progression of employees in the Maintenance Department shall be as provided in Appendix C attached hereto and a part of this Agreement.

10.6 To maintain their rehiring rights, employees who are laid off because of lack of work must notify the Company in writing once in each thirty (30) days following date of layoff, giving their current address and signifying their continued interest in returning to work for the Company. The failure of an employee to comply with the above provision within the time limit specified shall void his rehiring rights. When employees are laid off, they will be advised of this provision. Employees being recalled to work shall be notified by certified mail and must return to work within ten (10) days from date of such notice unless an extension of time is agreed upon. A copy of said notification shall also be sent to the Union.

10.7 In applying 10.4.2 an employee who has by-passed another employee(s) will be deemed to have one (1) day more seniority than the bypassed employee(s). The above sentence shall, effective September 23, 1968 apply only to cases in which an employee(s) refuses a promotion and such can be refused only with the Company's permission. After September 23, 1968, employees who are bypassed for promotion because of disqualification by the Company shall not lose seniority to those who bypass them but such bypassed employee(s) shall not be deemed eligible for future consideration for promotion unless they present the Company with acceptable proof that they have eliminated or overcome the reason for the disqualification.

10.8 If the Company makes an error in applying the

provisions of this Section with regard to layoffs, recalls, promotions, demotions, transfers, the Company shall not be liable for any payment to an employee as correction or compensation for such error for such period of time from the time the employee or the Union knew or was aware of the error until he or the Union brings the error to the attention of the Company.

10.9.1 Job seniority shall be lost and all rights attributable to it forfeited by:

a. Transfer to another line of progression which extends beyond periods specified in 10.2 above.

b. Transfer to another department which extends beyond periods specified in 10.2 above.

c. Separation initiated by employee which shall be deemed to include resignation and retirement.

d. Discharge.

e. Absence due either to layoff or disability, or both, for a period equal to his plant seniority at the time such absence began, but in no event shall an employee retain seniority if absent in excess of two years.

f. Failure to comply with Section 10.6.

10.9.2 Department seniority shall be lost and all rights attributable to it forfeited by: (b) through (f) of paragraph 10.9.1.

10.9.3 Plant seniority shall be lost and all rights under this Agreement forfeited by (c) through (f) of paragraph 10.9.1.

10.9.4 During the first continuous sixty days of lay-off an employee's seniority shall continue to increase and if he returns to work within this period, he shall be reinstated without loss of seniority. During such period he shall not receive holiday pay or other benefits unless he is recalled within ten calendar days from the date of lay-off.

* * *

WONDERLIC

PERSONNEL TEST

FORM A

NAME _____ Date _____
(Please Print)

READ THIS PAGE CAREFULLY. DO EXACTLY AS YOU ARE TOLD. DO NOT TURN OVER THIS PAGE UNTIL YOU ARE INSTRUCTED TO DO SO.

This is a test of problem solving ability. It contains various types of questions. Below is a sample question correctly filled in:

REAP is the opposite of

1 obtain, 2 cheer, 3 continue, 4 exist, 5 sow ..... [5]

The correct answer is "sow." (It is helpful to underline the correct word.) The correct word is numbered 5. Then write the figure 5 in the brackets at the end of the line.

Answer the next sample question yourself.

Gasoline sells for 23 cents per gallon. What will 4 gallons cost? ..... [ ]

The correct answer is 92¢. There is nothing to underline so just place "92¢" in the brackets.

Here is another example:

MINER MINOR — Do these words have

1 similar meaning, 2 contradictory, 3 mean neither same nor opposite? ..... [ ]

The correct answer is "mean neither same nor opposite" which is number 3 so all you have to do is place a figure "3" in the brackets at the end of the line.

When the answer to a question is a letter or a number, put the letter or number in the brackets. All letters should be printed.

This test contains 50 questions. It is unlikely that you will finish all of them, but do your best. After the examiner tells you to begin, you will be given exactly 12 minutes to work as many as you can. Do not go so fast that you make mistakes since you must try to get as many right as possible. The questions become increasingly difficult, so do not skip about. Do not spend too much time on any one problem. The examiner will not answer any questions after the test begins.

Now, lay down your pencil and wait for the examiner to tell you to begin!

Do not turn the page until you are told to do so.

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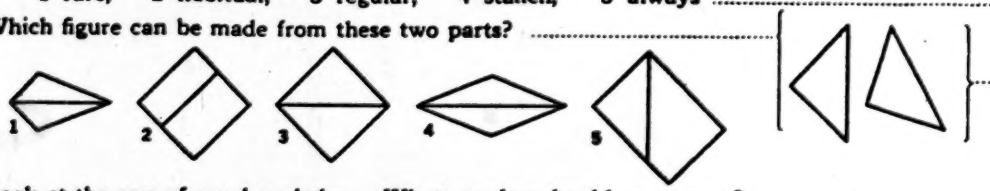
PRINTED IN U.S.A.

1. The last month of the year is
   1 January, 2 March, 3 July, 4 December, 5 October ..... [___]
2. CAPTURE is the opposite of
   1 place, 2 release, 3 risk, 4 venture, 5 degrade ..... [___]
3. Most of the items below resemble each other. Which one is least like the others?
   1 January, 2 August, 3 Wednesday, 4 October, 5 December. ..... [___]
4. Answer by printing YES or NO—Does R.S.V.P. mean "reply not necessary"? ..... [___]
5. In the following set of words, which word is different from the others?
   1 troop, 2 league, 3 participate, 4 pack, 5 gang ..... [___]
6. USUAL is the opposite of
   1 rare, 2 habitual, 3 regular, 4 stanch, 5 always ..... [___]
7. Which figure can be made from these two parts? .....



[___]

8. Look at the row of numbers below. What number should come next?
   8 4 2 1 ½ ¼ ? ..... [___]
9. CLIENT CUSTOMER—Do these words have
   1 similar meanings, 2 contradictory, 3 mean neither same nor opposite? ..... [___]
10. Which word below is related to smell as chew is to teeth?
    1 sweet, 2 stink, 3 odor, 4 nose, 5 clean ..... [___]
11. AUTUMN is the opposite of
    1 vacation, 2 summer, 3 spring, 4 winter, 5 fall ..... [___]
12. A train travels 300 feet in ½ second. At this same speed, how many feet will it travel in 10 seconds? ..... [___]
13. Assume the first 2 statements are true. Is the final one:
    1 true, 2 false, 3 not certain?
    These boys are normal children. All normal children are active.
    These boys are active ..... [___]
14. REMOTE is the opposite of
    1 secluded, 2 near, 3 far, 4 hasty, 5 exact ..... [___]
15. Lemons sell at 3 for 10 cents. How much will 1½ dozens cost? ..... [___]
16. How many of the five items listed below are exact duplicates of each other? ..... [___]

84721	84721
9210651	9210561
14201201	14210210
96101101	96101161
88884444	88884444

17. Suppose you arranged the following words so that they made a true statement. Then print the last letter of the last word as the answer to this problem.
    always A verb sentence a has ..... [___]
18. A boy is 5 years old and his sister is twice as old. When the boy is 8 years old, what will be the age of his sister? ..... [___]
19. IT'S ITS—Do these words have
    1 similar meanings, 2 contradictory, 3 mean neither same nor opposite? ..... [___]
20. Assume that the first 2 statements are true. Is the final statement:
    1 true, 2 false, 3 not certain?
    John is the same age as Sally. Sally is younger than Bill. John is younger than Bill. .... [___]
21. A dealer bought some cars for $4000. He sold them for $5000, making $50 on each car. How many cars were involved? ..... [___]
22. Suppose you arrange the following words so that they make a complete sentence. If it is a true statement, put a (T) in the brackets; if false, put an (F) there.
    eggs lay All chickens ..... [___]
23. Two of the following proverbs have the same meaning. Which ones are they? ..... [___]
    1. Many a good cow hath a bad calf.
    2. Like father, like son.
    3. A miss is as good as a mile.
    4. A man is known by the company he keeps.
    5. They are seeds out of the same bowl.
24. A watch lost 1 minute 18 seconds in 39 days. How many seconds did it lose per day? ..... [___]
25. CANVASS CANVAS—Do these words have
    1 similar meaning. 2 contradictory, 3 mean neither same nor opposite? ..... [___]
26. Assume the first 2 statements are true. Is the final one: 1 true, 2 false, 3 not certain?
    All Quakers are pacifists. Some of the people in this room are Quakers. Some of the people in this room are pacifists ..... [___]
27. In 30 days a boy saved $1.00. What was his average daily saving? ..... [___]
28. INGENIOUS INGENUOUS—Do these words have
    1 similar meanings, 2 contradictory, 3 mean neither same nor opposite? ..... [___]
29. Two men caught 36 fish; X caught 5 times as many as Y. How many fish did Y catch? ..... [___]

30. A rectangular bin, completely filled, holds 800 cubic feet of grain. If the bin is 8 feet wide and 10 feet long, how deep is it? ..... [___]

31. One number in the following series does not fit in with the pattern set by the others. What should that number be? ½ ¼ ¼ ⅛ ⅛ 1/12 ..... [___]

32. Answer this question by printing YES or NO. Does A.D. mean "In the year of our Lord"? .... [___]

33. CREDITABLE CREDULOUS—Do these words have
1 similar meaning, 2 contradictory, 3 mean neither same nor opposite? ..... [___]

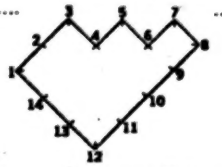
34. A skirt requires 2¼ yards of material. How many can be cut from 45 yards? ..... [___]

35. A clock was exactly on time at noon on Monday. At 2 P.M. on Wednesday, it was 25 seconds slow. At that same rate, how much did it lose in ½ hour? ..... [___]

36. Our baseball team lost 9 games this season. This was ⅜ of all they played. How many games did they play this season? ..... [___]

37. What is the next number in this series? 1 .5 .25 .125 ? ..... [___]

38. This geometric figure can be divided by a straight line into two parts which will fit together in a certain way to make a perfect square. Draw such a line by joining two of the numbers. Then write the numbers as the answer. .... [___]



39. Are the meanings of the following sentences 1 similar, 2 contradictory, 3 neither similar nor contradictory? A new broom sweeps clean. Old shoes are easiest. ..... [___]

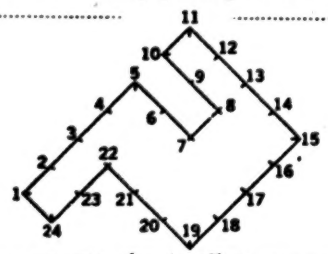
40. How many of the five items listed below are exact duplicates of each other? ..... [___]

Rexford, J. D.	Rockford, J. D.
Singleton, M. O.	Simbleten, M. O.
Richards, W. E.	Richard, W. E.
Siegel, A. B.	Seigel, A. B.
Wood, A. O.	Wood, A. O.

41. Two of the following proverbs have similar meanings. Which ones are they? .....[___]

1. You cannot make a silk purse out of a sow's ear.
2. He that steals an egg will steal an ox.
3. A rolling stone gathers no moss.
4. You cannot damage a wrecked ship.
5. It is the impossible that happens.

42. This geometric figure can be divided by a straight line into two parts which will fit together in a certain way to make a perfect square. Draw such a line by joining two of the numbers. Then write these numbers as the answer. .... [___]



43. Which number in the following group of numbers represents the smallest amount?
10 1 .999 .33 11 ..... [___]

44. Are the meanings of the following sentences:
1 similar, 2 contradictory, 3 neither similar nor contradictory?
No honest man ever repented for his honesty. Honesty is praised and starves. ..... [___]

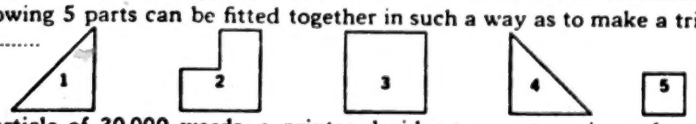
45. For $1.80 a grocer buys a case of oranges which contains 12 dozen. He knows that two dozen will spoil before he sells them. At what price per dozen must he sell the good ones to gain ⅓ of the whole cost? ..... [___]

46. In the following set of words, which word is different from the others?
1 colony, 2 companion, 3 covey, 4 crew, 5 constellation ..... [___]

47. Assume that the first 2 statements are true. Is the final one: 1 true, 2 false, 3 not certain: Great men are ridiculed. I am ridiculed. I am a great man. ..... [___]

48. Three men form a partnership and agree to divide the profits equally. X invests $4500, Y invests $3500 and Z invests $2000. If the profits are $1500, how much less does X receive than if the profits were divided in proportion to the amount invested? ..... [___]

49. Four of the following 5 parts can be fitted together in such a way as to make a triangle. Which 4 are they? .... [___]



50. In printing an article of 30,000 words, a printer decides to use two sizes of type. Using the larger type, a printed page contains 1200 words. Using the smaller type, a page contains 1500 words. The article is allotted 22 pages in a magazine. How many pages must be in the smaller type? ..... [___]

SCORING STENCIL FOR THE WONDERLIC PERSONNEL TEST

Answers must be exactly the same as shown here. There is only one correct answer for each question. Items omitted are counted wrong. The final score is the total number of questions answered correctly in exactly 12 minutes.

FORM A

Question No. 1.	Question No. 50.
4	12
2	3
3	NO
3	$175
1	3
3	1,2,4,5
1	2
4	24¢
3	2
1/6	3
1	$1000
2	3
60¢	4
2	B
1 or T	13
	3
	1 or T
	20
	2
	3
	F
	2-5
	2
	3
	1 or T
	3½¢
	3

| | | |

WONDERLIC

PERSONNEL TEST

FORM B

NAME..... Date.....
(Please Print)

READ THIS PAGE CAREFULLY. DO EXACTLY AS YOU ARE TOLD. DO NOT TURN OVER THIS PAGE UNTIL YOU ARE INSTRUCTED TO DO SO.

This is a test of problem solving ability. It contains various types of questions. Below is a sample question correctly filled in:

REAP is the opposite of

1 obtain, 2 cheer, 3 continue, 4 exist, 5 sow ..... [5]

The correct answer is "sow." (It is helpful to underline the correct word.) The correct word is numbered 5. Then write the figure 5 in the brackets at the end of the line.

Answer the next sample question yourself.

Gasoline sells for 23 cents per gallon. What will 4 gallons cost? ..... [___]

The correct answer is 92¢. There is nothing to underline so just place "92¢" in the brackets.

Here is another example:

MINER MINOR — Do these words have

1 similar meaning, 2 contradictory, 3 mean neither same nor opposite? ..... [___]

The correct answer is "mean neither same nor opposite" which is number 3 so all you have to do is place a figure "3" in the brackets at the end of the line.

When the answer to a question is a letter or a number, put the letter or number in the brackets. All letters should be printed.

This test contains 50 questions. It is unlikely that you will finish all of them, but do your best. After the examiner tells you to begin, you will be given exactly 12 minutes to work as many as you can. Do not go so fast that you make mistakes since you must try to get as many right as possible. The questions become increasingly difficult, so do not skip about. Do not spend too much time on any one problem. The examiner will not answer any questions after the test begins.

Now, lay down your pencil and wait for the examiner to tell you to begin!

Do not turn the page until you are told to do so.

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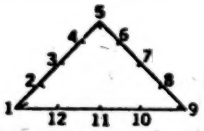
1. **PAIN** is the opposite of
   1 poison, 2 torment, 3 agony, 4 comfort, 5 punish ..... [___]
2. One number in the following series is omitted. What should that number be?
   100 97 94 ? 88 85 82 ..... [___]
3. **GENEROUS** is the opposite of
   1 noble, 2 popular, 3 moody, 4 neighborly, 5 stingy ..... [___]
4. **LUXURY** is the opposite of
   1 plenty, 2 rapture, 3 poverty, 4 devotion, 5 failure ..... [___]
5. In the following set of words, which word is different from the others?
   1 Methodist, 2 Easter, 3 Lutheran, 4 Catholic, 5 Quaker ..... [___]
6. **LINGER** is the opposite of
   1 maintain, 2 hasten, 3 require, 4 remain, 5 tarry ..... [___]
7. Assume the first two statements are true. Is the final one: 1 true, 2 false, 3 not certain? The violin is in tune with the piano. The piano is in tune with the harp. The harp is in tune with the violin. ..... [___]
8. Suppose you arrange the following words so that they make a complete sentence. If it is a true statement, mark (T) in the brackets; if false, put an (F) in the brackets.
   fuel wood are Coal and for used ..... [___]
9. **FURTHER FARTHER**—Do these words have
   1 similar meaning. 2 contradictory, 3 mean neither same nor opposite? ..... [___]
10. A man's car traveled 16 miles in 30 minutes. How many miles an hour was it traveling? ..... [___]
11. Are the meanings of the following sentences: 1 similar, 2 contradictory, 3 neither similar nor contradictory?
    A faithful friend is a strong defense. They never taste who always drink. ..... [___]
12. A dealer bought some cars for $2,000. He sold them for $2,400, making $50 on each car. How many cars were involved? ..... [___]
13. How many of the six pairs of items listed below are exact duplicates? ..... [___]

3421	1243
21212	21212
558956	558956
10120210	10120210
612986896	612986896
356471201	356571201

14. A boy is 6 years old and his sister is twice as old. When the boy is 10 years old, what will be the age of his sister? ..... [___]
15. In the following set of words, which word is different from the others?
    1 armada, 2 band, 3 brood, 4 boy, 5 crowd ..... [___]
16. Suppose you arranged the following words so that they make a true statement. Then print the last letter in the last word as the answer to this problem.
    is world The round ..... [___]
17. **VOCATION WORK**—Do these words have
    1 similar meaning. 2 contradictory, 3 neither same nor opposite? ..... [___]
18. Look at the row of numbers below. What number should come next?
    81 27 9 3 1 ⅓ ? ..... [___]
19. This geometric figure can be divided by a straight line into two parts which will fit together in a certain way to make a perfect square. Draw such a line by joining two of the numbers. Then write the numbers as the answer ..... [___]



20. How many of the five items listed below are exact duplicates of each other? ..... [___]

Patterson, A. J.	Paterson, A. J.
Smith, A. O.	Smith, O. A.
Bleed, O. M.	Bleed, O. M.
Petersen, O. W.	Peterson, O. W.
Cash, I. O.	Cash, I. O.

21. Suppose you arrange the following words so that they make a complete sentence. If it is a true statement, mark (T) in the brackets; if false, put an (F) in the brackets.
    all are Americans countries of citizens ..... [___]
22. Assume that the first 2 statements are true. Is the final statement:
    1 true, 2 false, 3 not certain?
    All red-headed boys are mischievous. Charles is red-headed. He is mischievous. ..... [___]
23. Two of the following proverbs have similar meanings. Which ones are they? ..... [___]
    1. A friend in need is a friend in deed.
    2. Fields have eyes and woods have ears.
    3. A fox is not caught twice in a snare.
    4. A setting hen never gets fat.
    5. A rolling stone gathers no moss.
24. A rectangular bin completely filled, holds 900 cubic feet of lime. If the bin is 10 feet long and 10 feet wide, how deep is it? ..... [___]

25. A watch lost 1 minute and 12 seconds in 24 days. How many seconds did it lose per day? ..... [___]

26. Assume that the first 2 statements are true. Is the final statement: 1 true, 2 false, 3 not certain? Most business men are progressive. Most business men are Republicans. Some progressive people are Republicans. ..... [___]

27. Gasoline is 15 cents a gallon. How many gallons can you buy for a dollar? ..... [___]

28. Are the meanings of the following sentences: 1 similar, 2 contradictory, 3 neither similar nor contradictory? Every pumpkin is known by its stem. Like father, like son. ..... [___]

29. If 2½ tons of coal cost $20, what will 3½ tons cost? ..... [___]

30. How many of the five pairs of items listed below are exact duplicates? ..... [___]

Silverstein, M. O.	Silverstien, M. O.
Harrisberg, L. W.	Harrisberg, L. M.
Seirs, J. C.	Sears, J. C.
Wood, A. B.	Woods, A. B.
Johnson, M. D.	Johnson, M. D.

31. Two men caught 75 fish. A caught four times as many as B. How many fish did B catch? ..... [___]

32. In the following set of words, which word is different from the others?
1 faculty, 2 fleet, 3 flock, 4 friend, 5 force ..... [___]

33. Assume the first 2 statements are true. Is the final one: 1 true, 2 false, 3 not certain?
Bert greeted Alice. Alice greeted Lou. Bert did not greet Lou. ..... [___]

34. Which number in the following group of numbers represents the smallest amount?
2 1 .9 .999 .88 ..... [___]

35. A side of beef weighs 250 lbs. The average daily beef consumption of a family is 1⅔ lbs. How long will this beef last them? ..... [___]

36. Are the meanings of the following sentences: 1 similar, 2 contradictory, 3 neither similar nor contradictory?
Friends agree best at a distance. Friends are one soul in two bodies. ..... [___]

37. How many square yards are there in a floor which is 9 feet long by 21 feet wide? ..... [___]

38. One number in the following series does not fit in with the pattern set by the others. What should that number be? 8 9 12 13 16 17 18 ..... [___]

39. Three of the following 5 parts can be fitted together in such a way to make a triangle. Which 3 are they? .... [___]

40. A soldier shooting at a target hits it 40% of the time. How many times must he shoot in order to register 100 hits? ..... [___]

41. Which number in the following series represents the smallest amount?
2 1 .8 .888 .99 ..... [___]

42. CENSOR CENSURE—Do these words have
1 similar meaning, 2 contradictory, 3 mean neither same nor opposite? ..... [___]

43. Are the meanings of the following sentences: 1 similar, 2 contradictory, 3 neither similar nor contradictory? A chip off the old block. A beggar's son struts like a peer. ..... [___]

44. A clock was exactly on time at noon on Monday. At 8 P.M. on Tuesday it was 32 seconds slow. At that same rate, how much did it lose in ½ hour? ..... [___]

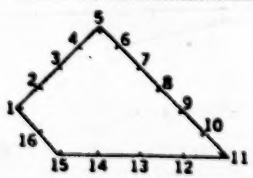
45. Are the meanings of the following sentences: 1 similar, 2 contradictory, 3 neither similar nor contradictory? He who demands, does not command. He that complies against his will is of his own opinion still. ..... [___]

46. For $2.40 a grocer buys a case of oranges which contains 12 dozen. He knows that two dozen will spoil before he sells them. At what price per dozen must he sell the good ones to gain ⅓ of the whole cost? ..... [___]

47. Are the meanings of the following sentences: 1 similar, 2 contradictory, 3 neither similar nor contradictory?
Where there's a will there is a way. The gods sell everything for labor. ..... [___]

48. The hours of daylight and darkness are nearest equal in
1 June, 2 September, 3 May, 4 December ..... [___]

49. This geometric figure can be divided by a straight line into two parts which will fit together in a certain way to make a perfect square. Draw such a line by joining 2 of the numbers. Then write these numbers as the answer. ..... [___]



50. Three men form a partnership and agree to divide the profits equally. X invests $5500, Y invests $3500, and Z invests $1000. If the profits are $3000, how much less does X receive than if the profits were divided in proportion to the amount invested? ..... [___]

FORM B

Question No. 1. 4

91

5

3

2

2

1 or T

T

1

32

3

8

4

16

4

D

1

1/6

5-11

2

F

1 or T

4-5

9 ft.

FORM B

SCORING STENCIL FOR THE WONDERLIC PERSONNEL TEST

Answers must be exactly the same as shown here. There is only one correct answer for each question. Items omitted are counted wrong. The final score is the total number of questions answered correctly in exactly 12 minutes.

FORM B

Question No. 50. $650

9-13

2

1

32¢

3

2 ½ SEC.

3

.8

250

1,3,4

20

21

2 150 days

.88

3

4

15

1 $28

1

1 or T 6¢

3

PLAINTIFFS' EXHIBIT NO. 27B

FEDERAL REGISTER

Volume 35 - Number 149

Saturday, August 1, 1970 - Washington, D. C.

Pages 12311-12379

Title 29—Labor

Chapter XIV—Equal Employment Opportunity Commission

Part 1607—Guidelines on Employee Selection Procedures

By virture of the authority vested in it by section 713 of title VII of the Civil Rights Act of 1964, 42 U.S.C., section 2000e-12, 78 Stat. 265, the Equal Employment Opportunity Commission hereby issues Title 29, Chapter XIV, § 1607 of the Code of Federal Regulations.

These Guidelines on Employee Selection Procedures supersede and enlarge upon the Guidelines on Employment Testing Procedures, issued by the Equal Employment Opportunity Commission on August 24, 1966. Because the material herein is interpretive in nature, the provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rule making, opportunity for public participation, and delay in effective date are inapplicable. The Guidelines shall be applicable to charges and cases presently pending or hereafter filed with the Commission.

Sec.

1607.1 Statement of purpose.

1607.2 "Test" defined.

1607.3 Discrimination defined.

1607.4 Evidence of validity.

1607.5 Minimum standards of validation.

1607.6 Presentation of validity evidence.

1607.7 Use of other validity evidence.

1607.8 Assumption of validity.

1607.9 Continued use of tests.

1607.10 Employment agencies and employment services.

1607.11 Disparate treatment.

1607.12 Retesting.

1607.13 Other selection techniques.

1607.14 Affirmative action.

Authority: The provisions of this Part 1607 issued under Sec. 713, 73 Stat. 265, 42 U.S.C. sec. 2000e-12.

§ 1607.1 *Statement of purpose.*

(a) The guidelines in this part are based on the belief that properly validated and standardized employee selection procedures can significantly contribute to the implementation of non-discriminatory personnel policies, as required by title VII. It is also recognized that professionally developed tests, when used in conjunction with other tools of personnel assessment and complemented by sound pro-

grams of job design, may significantly aid in the development and maintenance of an efficient work force and, indeed, aid in the utilization and conservation of human resources generally.

(b) An examination of charges of discrimination filed with the Commission and an evaluation of the results of the Commission's compliance activities has revealed a decided increase in total test usage and a marked increase in doubtful testing practices which, based on our experience, tend to have discriminatory effects. In many cases, persons have come to rely almost exclusively on tests as the basis for making the decision to hire, transfer, promote, grant membership, train, refer or retain, with the result that candidates are selected or rejected on the basis of a single test score. Where tests are so used, minority candidates frequently experience disproportionately high rates of rejection by failing to attain score levels that have been established as minimum standards for qualification.

It has also become clear that in many instances persons are using tests as the basis for employment decisions without evidence that they are valid predictors of employee job performance. Where evidence in support of presumed relationships between test performance and job behavior is lacking, the possibility of discrimination in the application of test results must be recognized. A test lacking demonstrated validity (i.e., having no known significant relationship to job behavior) and yielding lower scores for classes protected by title VII may result in the rejection of many who have necessary qualifications for successful work performance.

(c) The guidelines in this part are designed to serve as a workable set of standards for employers, unions and em-

ployment agencies in determining whether their selection procedures conform with the obligations contained in title VII of the Civil Rights Act of 1964. Section 703 of title VII places an affirmative obligation upon employers, labor unions, and employment agencies, as defined in section 701 of the Act, not to discriminate because of race, color, religion, sex, or national origin. Subsection (h) of section 703 allows such persons "* * * to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin."

§ 1607.2 *"Test" defined.*

For the purpose of the guidelines in this part, the term "test" is defined as any paper-and-pencil or performance measure used as a basis for any employment decision. The guidelines in this part apply, for example, to ability tests which are designed to measure eligibility for hire, transfer, promotion, membership, training, referral or retention. This definition includes, but is not restricted to, measures of general intelligence, mental ability and learning ability; specific intellectual abilities; mechanical, clerical and other aptitudes; dexterity and coordination; knowledge and proficiency; occupational and other interests; and attitudes, personality or temperament. The term "test" includes all formal, scored, quantified or standardized techniques of assessing job suitability including, in addition to the above, specific qualifying or disqualifying personal history or background requirements, specific educational or work history requirements, scored interviews, biographical information blanks, interviewers' rating scales, scored application forms, etc.

§ 1607.3 *Discrimination defined.*

The use of any test which adversely affects hiring, promotion, transfer or any other employment or membership opportunity of classes protected by title VII constitutes discrimination unless: (a) the test has been validated and evidences a high degree of utility as hereinafter described, and (b) the person giving or acting upon the results of the particular test can demonstrate that alternative suitable hiring, transfer or promotion procedures are unavailable for his use.

§ 1607.4 *Evidence of validity.*

(a) Each person using tests to select from among candidates for a position or for membership shall have available for inspection evidence that the tests are being used in a manner which does not violate § 1607.3. Such evidence shall be examined for indications of possible discrimination, such as instances of higher rejection rates for minority candidates than nonminority candidates. Furthermore, where technically feasible, a test should be validated for each minority group with which it is used; that is, any differential rejection rates that may exist, based on a test, must be relevant to performance on the jobs in question.

(b) The term "technically feasible" as used in these guidelines means having or obtaining a sufficient number of minority individuals to achieve findings of statistical and practical significance, the opportunity to obtain unbiased job performance criteria, etc. It is the responsibility of the person claiming absence of technical feasibility to positively demonstrate evidence of this absence.

(c) Evidence of a test's validity should consist of emperical data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.

(1) If job progression structures and seniority provisions are so established that new employees will probably, within a reasonable period of time and in a great majorty of cases, progress to a higher level, it may be considered that candidates are being evaluated for jobs at that higher level. However, where job progression is not so nearly automatic, or the time span is such that higher level jobs or employees' potential may be expected to change in significant ways, it shall be considered that candidates are being evaluated for a job at or near the entry level. This point is made to underscore the principle that attainment of or performance at a higher level job is a relevant criterion in validating employment tests only when there is a high probability that persons employed will in fact attain that higher level job within a reasonable period of time.

(2) Where a test is to be used in diferent units of a multiunit organization and no significant differences exist between units, jobs, and applicant populations, evidence obtained in one unit may suffice for the others. Similarly, where the validation process requires the collection of data throughout a multiunit organization, evidence of validity specific to each unit may not be required. There may also be instances where evidence of validity is appropriately obtained from more than one company in the same industry. Both in this instance and in the use of data collected throughout a multiunit organization, evidence of validity

specific to each unit may not be required: *Provided,* That no significant differences exist between units, jobs, and applicant populations.

§ 1607.5 *Minimum standards for validation.*

(a) For the purpose of satisfying the requirements of this part, empirical evidence in support of a test's validity must be based on studies employing generally accepted procedures for determining criterion-related validity such as those described in "Standards for Educational and Psychological Tests and Manuals" published by American Psychological Association, 1200 17th Street NW., Washington, D.C. 20036. Evidence of content or construct validity, as defined in that publication, may also be appropriate where criterion-related validity is not feasible. However, evidence for content or construct validity should be accompanied by sufficient information from job analysis to demonstrate the relevance of the content (in the case of job knowledge or proficiency tests) or the construct (in the case of trait measures). Evidence of content validity alone may be acceptable for well-developed tests that consist of suitable samples of the essential knowledge, skills or behaviors composing the job in question. The types of knowledge, skills or behaviors contemplated here do not include those which can be acquired in a brief orientation to the job.

(b) Although any appropriate validation strategy may be used to develop such empirical evidence, the following minimum standards, as applicable, must be met in the research approach and in the presentation of results which constitute evidence of validity:

(1) Where a validity study is conducted in which tests are administered to applicants, with criterion data collected

later, the sample of subjects must be representative of the normal or typical candidate group for the job or jobs in question. This further assumes that the applicant sample is representative of the minority population available for the job or jobs in question in the local labor market. Where a validity study is conducted in which tests are administered to present employees, the sample must be representative of the minority groups currently included in the applicant population. If it is not technically feasible to include minority employees in validation studies conducted on the present work force, the conduct of a validation study without minority candidates does not relieve any person of his subsequent obligation for validation when inclusion of minority candidates becomes technically feasible.

(2) Tests must be administered and scored under controlled and standardized conditions, with proper safeguards to protect the security of test scores and to insure that scores do not enter into any judgments of employee adequacy that are to be used as criterion measures. Copies of tests and test manuals, including instructions for administration, scoring, and interpretation of test results, that are privately developed and/or are not available through normal commercial channels must be included as a part of the validation evidence.

(3) The work behaviors or other criteria of employee adequacy which the test is intended to predict or identify must be fully described; and, additionally, in the case of rating techniques, the appraisal form(s) and instructions to the rater(s) must be included as a part of the validation evidence. Such criteria may include measures other than actual work proficiency, such as training time, supervisory

ratings, regularity of attendance and tenure. Whatever criteria are used they must represent major or critical work behaviors as revealed by careful job analyses.

(4) In view of the possibility of bias inherent in subjective evaluations, supervisory rating techniques should be carefully developed, and the ratings should be closely examined for evidence of bias. In addition, minorities might obtain unfairly low performance criterion scores for reasons other than supervisors' prejudice, as, when, as new employees, they have had less opportunity to learn job skills. The general point is that all criteria need to be examined to insure freedom from factors which would unfairly depress the scores of minority groups.

(5) Differential validity. Data must be generated and results separately reported for minority and nonminority groups wherever technically feasible. Where a minority group is sufficiently large to constitute an identifiable factor in the local labor market, but validation data have not been developed and presented separately for that group, evidence of satisfactory validity based on other groups will be regarded as only provisional compliance with these guidelines pending separate validation of the test for the minority group in question. (See § 1607.9). A test which is differentially valid may be used in groups for which it is valid but not for those in which it is not valid. In this regard, where a test is valid for two groups but one group characteristically obtains higher test scores than the other without a corresponding difference in job performance, cutoff scores must be set so as to predict the same probability of job success in both groups.

(c) In assessing the utility of a test the following considerations will be applicable:

(1) The relationship between the test and at least one relevant criterion must be statistically significant. This ordinarily means that the relationship should be sufficiently high as to have a probability of no more than 1 to 20 to have occurred by chance. However, the use of a single test as the sole selection device will be scrutinized closely when that test is valid against only one component of job performance.

(2) In addition to statistical significance, the relationship between the test and criterion should have practical significance. The magnitude of the relationship needed for practical significance or usefulness is affected by several factors, including:

(i) The larger the proportion of applicants who are hired for or placed on the job, the higher the relationship needs to be in order to be practically useful. Conversely, a relatively low relationship may prove useful when proportionately few job vacancies are available;

(ii) The larger the proportion of applicants who become satisfactory employees when not selected on the basis of the test, the higher the relationship needs to be between the test and a criterion of job success for the test to be practically useful. Conversely, a relatively low relationship may prove useful when proportionately few applicants turn out to be satisfactory;

(iii) The smaller the economic and human risks involved in hiring an unqualified applicant relative to the risks entailed in rejecting a qualified applicant, the greater the relationship needs to be in order to be practically useful. Conversely, a relatively low relationship may prove useful when the former risks are relatively high.

§ 1607.6 *Presentation of validity evidence.*

The presentation of the results of a validation study must include graphical and statistical representations of the relationships between the test and the criteria, permitting judgments of the test's utility in making predictions of future work behavior. (See § 1607.5(c) concerning assessing utility of a test.) Average scores for all tests and criteria must be reported for all relevant subgroups, including minority and nonminority groups where differential validation is required. Whenever statistical adjustments are made in validity results for less than perfect reliability or for restriction of score range in the test or the criterion, or both, the supporting evidence from the validation study must be presented in detail. Furthermore, for each test that is to be established or continued as an operational employee selection instrument, as a result of the validation study, the minimum acceptable cutoff (passing) score on the test must be reported. It is expected that each operational cutoff score will be reasonable and consistent with normal expectations of proficiency within the work force or group on which the study was conducted.

§ 1607.7 *Use of other validity studies.*

In cases where the validity of a test cannot be determined pursuant to § 1607.4 and § 1607.5 (e.g., the number of subjects is less than that required for a technically adequate validation study, or an appropriate criterion measure cannot be developed), evidence from validity studies conducted in other organizations, such as that reported in test manuals and professional literature, may be considered acceptable when: (a) The studies pertain to jobs which are comparable (i.e., have basically the same task elements), and (b) there

are no major differences in contextual variables or sample composition which are likely to significantly affect validity. Any person citing evidence from other validity studies as evidence of test validity for his own jobs must substantiate in detail job comparability and must demonstrate the absence of contextual or sample differences cited in paragraphs (a) and (b) of this section.

§ 1607.8 *Assumption of validity.*

(a) Under no circumstances will the general reputation of a test, its author or its publisher, or casual reports of test utility be accepted in lieu of evidence of validity. Specifically ruled out are: assumptions of validity based on test names or descriptive labels; all forms of promotional literature; data bearing on the frequency of a test's usage; testimonial statements of sellers, users, or consultants; and other nonemperical or anecdotal accounts of testing practices or testing outcomes.

(b) Although professional supervision of testing activities may help greatly to insure technically sound and nondiscriminatory test usage, such involvement alone shall not be regarded as constituting satisfactory evidence of test validity.

§ 1607.9 *Continued use of tests.*

Under certain conditions, a person may be permitted to continue the use of a test which is not at the moment fully supported by the required evidence of validity. If, for example, determination of criterion-related validity in a specific setting is practicable and required but not yet obtained, the use of the test may continue: *Provided:* (a) The person

can cite substantial evidence of validity as described in § 1607.7 (a) and (b); and (b) he has in progress validation procedures which are designed to produce, within a reasonable time, the additional data required. It is expected also that the person may have to alter or suspend test cutoff scores so that score ranges broad enough to permit the identification of criterion-related validity will be obtained.

§ 1607.10 *Employment agencies and employment services.*

(a) An employment service, including private employment agencies, State employment agencies, and the U.S. Training and Employment Service, as defined in section 701(c), shall not make applicant or employee appraisals or referrals based on the results obtained from any psychological test or other selection standard not validated in accordance with these guidelines.

(b) An employment agency or service which is requested by an employer or union to devise a testing program is required to follow the standards for test validation as set forth in these guidelines. An employment service is not relieved of its obligation herein because the test user did not request such validation or has requested the use of some lesser standard than is provided in these guidelines.

(c) Where an employment agency or service is requested only to administer a testing program which has been elsewhere devised the employment agency or service shall request evidence of validation, as described in the guidelines in this part, before it administers the testing program and/or makes referral pursuant to the test results. The employment agency must furnish on request such evidence of validation. An employment agency or service will be expected to refuse to administer a test where the employer or

union does not supply satisfactory evidence of validation. Reliance by the test user on the reputation of the test, its author, or the name of the test shall not be deemed sufficient evidence of validity (see § 1607.8(a)). An employment agency or service may administer a testing program where the evidence of validity comports with the standards provided in § 1607.7.

§ 1607.11 *Disparate treatment.*

The principle of disparate or unequal treatment must be distinguished from the concepts of test validation. A test or other employee selection standard—even though validated against job performance in accordance with the guidelines in this part—cannot be imposed upon any individual or class protected by title VII where other employees, applicants or members have not been subjected to that standard. Disparate treatment, for example, occurs where members of a minority or sex group have been denied the same employment, promotion, transfer or membership opportunities as have been made available to other employees or applicants. Those employees or applicants who have been denied equal treatment, because of prior discriminatory practices or policies, must at least be afforded the same opportunities as had existed for other employees or applicants during the period of discrimination. Thus, no new test or other employee selection standard can be imposed upon a class of individuals protected by title VII who, but for prior discrimination, would have been granted the opportunity to qualify under less stringent selection standards previously in force.

§ 1607.12 *Retesting.*

Employers, unions, and employment agencies should provide an opportunity for retesting and reconsideration to

earlier "failure" candidates who have availed themselves of more training or experience. In particular, if any applicant or employee during the course of an interview or other employment procedure claims more education or experience, that individual should be retested.

§ 1607.13 *Other selection techniques.*

Selection techniques other than tests, as defined in § 1607.2, may be improperly used so as to have the effect of discriminating against minority groups. Such techniques include, but are not restricted to, unscored or casual interviews and unscored application forms. Where there are data suggesting employment discrimination, the person may be called upon to present evidence concerning the validity of his unscored procedures as well as of any tests which may be used, the evidence of validity being of the same types referred to in §§ 1607.4 and 1607.5. Data suggesting the possibility of discrimination exist, for example, when there are differential rates of applicant rejection from various minority and nonminority or sex groups for the same job or group of jobs or when there are disproportionate representations of minority and nonminority or sex groups among present employees in different types of jobs. If the person is unable or unwilling to perform such validation studies, he has the option of adjusting employment procedures so as to eleminate the conditions suggestive of employment discrimination.

§ 1607.14 *Affirmative action.*

Nothing in these guidelines shall be interpreted as diminishing a person's obligation under both title VII and Executive Order 11246 as amended by Executive Order

11375 to undertake affirmative action to ensure that applicants or employees are treated without regard to race, color, religion, sex, or national origin. Specifically, the use of tests which have been validated pursuant to these guidelines does not relieve employers, unions or employment agencies of their obligations to take positive action in affording employment and training to members of classes protected by title VII.

The guidelines in this part are effective upon publication in the *Federal Register*.

Signed at Washington, D.C., 21st day of July 1970.

[Seal] William H. Brown, III,
Chairman.

[F.R. Doc. 70-9962; Filed, July 31, 1970; 8:40 a.m.]

PLAINTIFFS' EXHIBIT NO. 29

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Part II

Department Of Labor
Office of the Secretary

Validation of Employment Tests by Contractors and Subcontractors Subject to the Provisions of Executive Order 11246

Department Of Labor
Office of the Secretary

Employment Tests By Contractors And Subcontractors Validation

Validation of employment tests by contractors and subcontractors subject to the provisions of Executive Order 11246.

1. *General.* (a) The following order regarding the use of employment tests by contractors subject to the provisions of Executive Order 11246 is being issued in response to numerous requests for policy guidance by Government agencies and by contractors.

(b) Two matters regarding selection procedures are of foremost concern to the Government: (1) Recognizing the importance of proper procedures in the utilization and conservation of human resources generally, and (2) pointing out the possible adverse effects of improper procedures on the utilization of minority group personnel.

(c) The order is founded on the belief that properly validated and stardardized tests, by virtue of their relative objectivity and freedom from the biases that are apt to characterize more subjective evaluation techniques, can contribute substantially to the implementation of equitable and nondiscriminatory personnel policies. Moreover, professionally developed tests, carefully used in conjunction with other tools of personnel assessment and complemented by sound programs of training and job design, can significantly aid in the development and maintenance of an efficient work force.

(d) An examination by the Office of Federal Contract Compliance of compliance reviews of contractors has affirmed the increasing reliance on tests in the conduct of personnel activities. In many cases contractors have come to rely almost exclusively on tests as the basis for making employment and promotion decisions, with candidates sometimes selected or rejected on the basis of a single test score. The examination also disclosed that where employment tests are so used, minority candidates frequently experience disproportionately high rates of rejection through failing to attain score levels that have been established as minimum standards for qualification.

(e) The examination further suggests that there has been a decided increase since 1963 in total test usage and a particularly notable increase in the incidence of doubtful testing practices which, experience indicates, tend to have racially discriminatory effects. These findings are particularly evident in testing programs related to blue-collar and clerical job categories.

(f) It has become clear that in many instances contractors are using tests to determine qualification for hire,

transfer, or promotion without evidence that they are valid indices of performance potential. Where evidence in support of presumed relationships between test performance and job behavior is lacking, the possibility of discrimination in the application of test results must be recognized. A test lacking validity (i.e., having no significant relationship to job behavior) and yielding lower scores for minority candidates may resultantly reject many who have probabilities of successful work performance equal to those of non-minority candidates.

(g) The order that follows, dealing with basic issues of validity and fairness in those selection programs in which blue-collar and clerical job categories are primarily involved, was developed only after extensive discussions of the many complex problems and technical considerations with test experts and personnel management specialists from both academia and industry. The provisions of the order are designed to serve as a workable set of criteria for agencies and contractors in determining whether or not selection practices are in compliance with Executive Order 11246.

It is recognized that the tests used by the State Employment Agencies should be similarly validated, and it is expected that the U.S. Employment Service will expand, as necessary, its test validation program for State Agencies.

It is also recognized that test usage, as well as test validity, must be reviewed to determine its effect on the employment of minorities. For example, a test may be suspect when it is given in a language in which a significant number of minority applicants are not proficient and where language proficiency itself is not a bona fide requirement for the job. Similarly, a test or other qualification standard should not be used in a situation involving the transfer or

promotion of minority employees when such employees would already have occupied the positions involved without such qualifications were it not for past discriminatory practices.

Specific directives concerning test usage will be issued by the Office of Federal Contract Compliance within a short time.

2. *Evidence of validity.* (a) It is directed that each agency require each contractor regularly using tests to select from among candidates for hire, transfer or promotion to jobs other than professional, technical and managerial occupations (defined as occupational groups "0" and "1" in the "Dictionary of Occupational Titles," Third Ed.) to have available for inspection, within a reasonable time, evidence that the tests are valid for their intended purposes. Such evidence shall be examined in compliance reviews for indications of possible discrimination, such as instances of higher rejection rates for minority candidates than nonminority candidates.

(b) Evidence of a test's validity should consist of empirical data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior comprising or relevant to the job(s) for which candidates are being evaluated.

(1) If job progression structures and seniority provisions are so established that a new employee will probably, within a reasonable period of time and in a great majority of cases, progress to a higher level, it may be considered that candidates are being evaluated for jobs at that higher level. However, where job progression is not so nearly automatic, or the time span is such that higher level jobs may be expected to change in significant ways, it shall be con-

sidered that candidates are being evaluated for a job at or near the entry level. In the latter case, it would be appropriate for a contractor to institute performance or other tests as a condition of promotion provided such tests also have been validated pursuant to the provisions of this order.

(2) Where a test is to be used in different units of a multiunit organization and no significant differences exist between units, jobs, and applicant populations, evidence obtained in one unit may also suffice for the other. Similarly, where the validation process requires the collection of data throughout a multiunit organization, evidence of validity specific to each unit may not be required.

3. *Minimum standards for validation.* For the purpose of satisfying this order, empirical evidence in support of a test's validity must be based on studies employing generally accepted procedures for determining criterion-related validity, such as those described in the American Psychological Association's "Standards for Education and Psychological Tests and Manuals." (Evidence of content or construct validity may also be appropriate where criterion-related validity is not technically feasible, but it should be accompanied by sufficient information from job analyses to demonstrate the relevance of the content in the case of job knowledge or proficiency tests or the construct in the case of trait measures.) Although any appropriate validation strategy may be used to develop such empirical evidence, the following minimum standards must be met by any approach used so far as applicable:

(1) Where a predictive validity study is conducted, the sample of subjects must be representative of the normal or typical candidate group for the job(s) in question. Where a concurrent validity study is conducted, the sample should

be, so far as technically feasible, representative of the minority groups currently included in the candidate population.

(2) Tests must be administered and scored under controlled and standardized conditions, with proper safeguards employed to protect the security of test scores and insure that scores do not enter into any judgments of individual adequacy that are to be used as criterion measures.

(3) The work behaviors or other criteria of employee adequacy which the test is intended to predict or identify must be fully described. Such criteria may include measures other than actual work proficiency, such as training time, supervisory ratings, regularity of attendance, and tenure. In view of the possibility of bias inherent in subjective evaluations, supervisory rating techniques should be developed carefully and the ratings themselves examined closely for evidence of bias. Whatever criteria are used, however, they should represent major or critical work behaviors as revealed by careful job analyses.

(4) Presentations of the results of a validation study must include graphical and statistical representations of the relationships between the test and the criteria, permitting judgments of the test's utility in making predictions of future work behavior.

(5) Data must be generated and results reported separately for minority and nonminority groups wherever technically feasible.

* * *

6. *Assumptions of validity.* (a) Under no circumstances will the general reputation of a test, its author or its publisher, or casual reports of test utility be accepted in lieu of evidence of validity. Specifically ruled out are: assumptions

of validity based on test names or descriptive labels, all forms of promotional literature, data bearing on the frequency of a test's usage, testimonial statements of sellers or users, and other nonempirically based and ancedotal accounts of testing practices or testing outcomes.

(b) Although professional supervision of testing activities may help greatly to insure technically sound and nondiscriminatory test usage, such involvement alone shall not be regarded as constituting satisfactory evidence of test validity.

7. *Continued use of tests.* Under certain conditions, a contractor may be permitted to continue the use of a test which is not at the moment fully supported by the required evidence of validity. If, for example, evidence of criterion-related validity in a specific setting is technically feasible and required but not yet obtained, the use of the test may continue *Provided:* (a) The contractor can cite substantial evidence of validity as described in section 5 above, and (b) he has in progress, validation procedures which are designed to produce, within a reasonable time, the additional data required. It is expected also that the contractor will use cut-off scores which yield score ranges broad enough to permit the identification of criterion-related validity.

8. *Affirmative action.* Nothing in this order shall be interpreted as diminishing a contractor's obligation to undertake affirmative action to ensure that applicants and current employees are treated without regard to race, creed, color or national origin. Specifically the use of tests which have been validated pursuant to this order does not relieve the contractor of his obligation to take positive and affirmative action in affording employment and training to minority group personnel.

9. *Definition of "test."* For the purpose of this order, "test" is defined as any paper-and-pencil or performance measure used to judge qualifications for hire, transfer or promotion. This definition includes, but is not restricted to, measures of general intelligence, mental ability, and learning ability; specific intellectual abilities; mechanical, clerical and other aptitudes; knowledge and proficiency; occupational and other interests; and personality or temperament.

* * *

PLAINTIFFS' EXHIBIT NO. 32

Bryan Deposition

The following excerpts are offered in evidence by plaintiffs from the deposition of John E. Bryan, Jr., taken by plaintiffs December 13, 14 and 15, 1967. Each excerpt is preceded by a reference to the page of the transcript from which it is taken. Questions are by plaintiffs' counsel unless otherwise noted.

* * *

[DEP. PP. 499-510]

Q Want to explain your role? A Ah, it might help you to understand it if I told you about the, what I was told about the history of it, because this affected my role in what I did subsequent to my coming here.

Q In addition to the role that you played at Albemarle? A All right, ah, Bill Warren told me that ah, in about '55, '56, just prior to the installation of the number four paper machine, which is the largest capacity paper machine, most modern that we have, that, ah, in conjunction with others in the plant management, he was asked to develop a testing program to get better qualified personnel to man this machine when it went into operation. They had tried to get, ah, better qualified people when number three machine was installed, another large modern paper machine, a few years earlier and, ah, had tried to hire those from outside ah, that had a high school education, but it had not ah, worked out satisfactorily; some of them even with a high school education didn't succeed and ah,—and either quit, were let go, or downgraded or what not, and they didn't make it on the machine, so they wanted to avoid this and Bill proceeded to discuss with other people in the company the possibility of

a testing program and to conduct a validation study. He had, ah, at that time a Master degree in Psychology from Purdue, and had specialized in this area. So, that he did an extensive validation study on the Beta and the Bennett Mechanical Comprehension test. He validated it, ah, against the performance of the incumbent employees at the time. He told me how he did that and so forth. Ah, from that time on, for positions on the general extra board and the Lines of Progression that led from that, they used the Beta and the Bennett Mechanical Comprehension, and for selection for the maintenance apprentice program when it was started a few years later. He found in his validation study that there was a significant correlation between the scores on Beta and performance on the job, and as a result of the statistical calculation you go through in validating tests, he established a cut-off score of, ah, a hundred on the Beta, now, I don't recall the scores in regard to the Bennetts, but; ah, they continued to use that then not only as for selecting people for the number four machine, but also as a pre-employment test from that time on, the Beta, and they were using Bennett Mechanical Comprehension. Now, after I came here, they used it to test and I talked to Bill Warren about it, and Bill at that time was manager of Labor Relations in Richmond. He was still with the company, and he told me, or I told him, ah, I just happened to mention one day that, ah, we were using a certain score which I don't recall, as cut off on the Bennett for selection of new employees, and ah, he said, "You mean that you're, ah, you're disqualifying people if they don't make that score?" And I said, "Yes, this is what they were doing when I got here, and I thought that was what you had established." Well, it turned out that Bill said that he did not find what he considered to be a significant enough correlation between

ah, the scores on the Bennett, and performance on the job, even though it had a high face validity, and, ah, he thought that, ah, since he left down here that they were only using it as a guide to, ah, selection without any cut-off score, without disqualifying anybody as a result, but when I found that out, I suppose several of us were probably concerned about it and we decided, ah, that we should not even use it at all since its, ah, validity had not been established, in fact, it had, ah, ah, I believe Bill said somewhat of a negative correlation, so, we quit using the Bennett at that time.

Q What possible way do you use this Mr. Bryan? A That would have been, uh, probably in the latter part of 1963, and from my knowledge of tests that I acquired in studying psychology, I am very familiar or well, I won't say very familiar, I was familiar with the Beta. I had not ever used it before, but I had studied its origin and development, and usage and knew that it was a nonverbal intelligence test. And I recommended and it was agreed by the local management that we should start using a Verbal Intelligence Test, as well as the Beta; we wanted to keep using the Beta because it had been validated locally, and I had had experience with using the Wonderlic before, which is a short form Verbal Intelligence Test, and knew that it had, uh, probably more validation studies behind it than any other short form Verbal Intelligence Test. So, after consultation we decided to institute the Wonderlic, in addition to the Beta, in view of the fact that the mill had changed quite a bit and it had become exceedingly more complex in operation; whereas in early years the person who was intelligent but had very little Verbal facilities acquired through formal education could, uh, perform satisfactorily on a lot of the jobs, uh, there were very few jobs and getting to be fewer and fewer jobs, in which this was possible, and

we needed people that were not only intelligent, but had a certain amount of, uh, intelligence and, uh, verbal facilities and this sort of thing to do more and more jobs, so, we felt, uh, in view of the fact that it is theoretically possible on the Beta to make a high score, uh, if you are illiterate, this was not the type of person that we needed today, to perform a good many skilled jobs, so, we instituted the Wonderlic and we did not, uh, validate it, uh, locally, primarily, because of the, the expense of conducting such a validation, and there were some other considerations, such as, uh, we didn't know whether we would get the co-operation of the employees that we'd need to validate it against in taking the test, and we certainly have to have that, so, we used National Norms and on my suggestion after study of the Wonderlic and Norms had been established nationally for skilled jobs, we developed a, uh, cut-off score of eighteen (18).

Q Now on the basis of this strike back, you said that uh, Mr. Warren told you that the Beta had been validated. Did he tell you what the validation process consisted of? A Yes.

Q Would you explain to me what he told you? A Yes sir, uh, he uh, took uh, people already employed in the plant, in skilled jobs such as, uh, on number three machine.

Q With the plant, I mean with the Roanoke Rapids facility? A Yes, this all pertains to Roanoke Rapids, part of the number three machine, and he took maintenance men, among others, and, uh, I'm sure, I think he may have taken, uh, pulp mill personnel and perhaps some from the wood yard, but the idea was to get people in the skilled jobs, and he explained what he was trying to do to these people and I think he said that he asked cooperation of the Union in

urging them to cooperate in the taking of the test. They were given the test on company time. Then he asked the supervisors over these individuals to use a rank order method of, uh, comparison in which the supervisor was given a deck of cards that had these people that he, with whom he was familiar with, or that he was familiar with their work he had supervised, and he was asked to rank them in order of, uh, his evaluation of their performance on skilled jobs if they were in the higher skilled jobs in the Line of Progression or if they had not progressed that far, what he thought their potential was to perform when they got to those skilled jobs. They ranked them and this was, uh, I believe, uh, I'm not sure, I think Bill even, uh, ran these through the computer to get them tabulated and to get a rank order comparison with their test scores. He did end up with a comparison between the ranking by the supervisor and the test scores that they made and this is how he developed the, uh, fact that there was a high correlation between score on the Beta and the ranking by the supervisors, and he had as many supervisors evaluate an individual as had sufficient knowledge of that individual's performance, for instance, uh, he'd have the first line supervisor evaluate the individual and then the next line supervisor would also evaluate the individual and in that way you got four tour foreman and these people had worked under different ones over the years so he would have each one evaluate the people they knew, so that he could get more than one supervisor's evaluation.

Q Would the, did you get Mr. Warren to tell you that the validation study was conducted only as to the skilled personnel? A Yes, that is correct.

Q Did Mr. Warren tell you that the sample that he used

included both Negro and white employment? A Uh, no, uh, matter of fact, uh, we didn't discuss race at all.

Q You didn't discuss race at all? A Uh huh.

Q At the time that you were Personnel Manager, Mr. Byran, do you know whether they had Negroes in the skilled Lines of Progression? A Well, at the time that I came here I don't recall there being any, in, uh, the skilled Lines of Progression. Since I have been in that job and my present job, there have been a number who have entered the skilled Lines of Progression.

Q Did Mr. Warren tell you that the validation study, tell you how long a period of time to make the validation study? A I don't recall him telling me specifically, but from all that he went through, I gathered that it took an amount of weeks or maybe it might have even taken a month or so, and he might have, it seems to me that, uh, it's perhaps possible that he, uh, he ran the study with maybe the paper machine crew on one occasion and maybe the maintenance department, uh, a little later. I vaguely recall something to that effect.

Q Did Mr. Warren tell you that the validation study had been reduced to writing? A Well, uh, not exactly. In that he had not written the whole thing up, uh, in what you might do if you were doing it for purposes of a thesis, let's say, and uh, he did have some records of uh, the test scores and rankings of individual employees, but that he had uh, he had not uh, written up a synopsis of it.

Q Did you read any written materials relating to the validation studies before you made your recommendations for a Verbal Test? A What do you mean by that?

Q Uh, I'm asking you that, I'm asking you if you read any reports, written reports or concerning the validation of the Beta Examination? Whether it was a complete report of a partial report of fragments before you made the recommendations for the institution of the Verbal Test. A If you ~~mean~~, did I, uh, read and uh, books on tests and measurements about—

Q No. A About the Beta?

Q What I'm asking is, you said that Mr. Warren conducted a validation test from the Beta. A Yes sir.

Q And you say you don't know whether he did a full written report of the validational studies. A I don't think he did.

Q He may have made fragmentary notations? A Yes.

Q Et cetera. I'm asking you if you read any of anything in writing relation to the validational study conducted by Mr. Warren before you made your recommendations for the Verbal Test? A I don't recall reading anything, because as I say, he didn't have a report, he and I just discussed the thing, uh, orally, and he told me what he had done and what the results were and this sort of thing, uh, and I don't know whether he showed me at that time or whether I saw it later, but I have seen at some time names of people and the scores that they made and uh, that served as a background for his putting these things together.

Q Now you stated that you did have some experience with the Wonderlic. A Yes sir.

Q Was this one of the reasons why you recommended the Wonderlic's use? What experience did you have with it?

A Of course, I first encountered the Wonderlic in college and courses on tests and measurement and uh, uh, studied it there and studied, uh, the material that had been developed about its validation and use and this sort of thing and, uh, I've taken the Wonderlic myself, on I don't know how many occasions in the, in terms of applying for jobs with other companies. Then, uh, uh, with, I think uh, with two previous employers uh, we used the Wonderlic.

* * *

PLAINTIFFS' EXHIBIT NO. 36A

Boinest Deposition

The following excerpts are offered in evidence by plaintiffs from the deposition of M. Lebby Boinest, Jr., taken by plaintiffs March 12 and 13, 1968. Each excerpt is preceded by a reference to the page of transcript from which it is taken. Questions are by Plaintiffs' Counsel unless otherwise noted.

* * *

[DEP. P. 26]

Q What is your occupation? A I am vice-president of the Kraft Paper Division of Albemarle Paper Company.

* * *

[DEP. P. 27]

Q Did you hold a position with the company prior to becoming manager of the grocery bag plant? A I did.

Q What position was that? A Paper Mill superintendent of the Roanoke Rapids Operation.

Q How long did you hold that position? A About 13 years.

* * *

[DEP. PP. 33-34]

Q Now you indicated that the B Paper Mill was opened after you went with the plant in 1952. Do you recall the approximate year that the B Paper Mill was opened? A The first part of the B Paper Mill went into operation on January 23, 1953.

Q When that mill was opened, you had the responsibility for supervising that department also? A I did.

Q You had the responsibility for securing employees for that department? A No.

Q Did you discuss with the personnel manager the staffing of the B Paper Mill? A Obviously.

Q Would you state the procedure you followed in staffing that department? A Well, let's see how much of it I can recall. We transferred some skilled people in certain paper machine Lines of Progression in our mills, in our Richmond mill, and from our Roanoke Rapids mill some of these boys were transferred to the new operation. Others were hired from competitive mills to fill the upper echelons of the Lines of Progression, Machine Tenders, Back Tenders, et cetera.

Beyond that, we transferred a number of people, I don't know how many, from other segments of the mill at Roanoke Rapids, and we employed the remaining persons from the local available labor force in the Roanoke Rapids area. Again I can't specifically say how many.

* * *

[DEP. P. 36]

Q Do you recall, Mr. Boinest, when you instituted testing at the Albemarle Paper Plant in Roanoke Rapids? A My memory is that it was sometime around 1955 or 1956. I can't be specific.

Q Do you recall, Mr. Boinest, when you instituted the requirement of a high school education at the Paper Plant in Roanoke Rapids? A It was sometime prior to the startup of No. 3 machine.

Q Would you explain what No. 3 machine is? A That was the beginning of the B Paper Mill. Excuse me.

* * *

[DEP. PP. 42-49]

Q Did you play a part in the determination to require the passing of a test for employment? A Well, I don't know how to interpret exactly what you mean by play a part. I was involved in a general decision on the part of the mill management to institute a testing program. That stemmed from the fact that we had not had in our judgment particularly good selection of experienced persons at the time of start-up of the No. 3 Paper Machine.

At the time the testing was talked about and at the time it was instituted, the company was already making plans for the installation of a second machine at Roanoke Rapids, which was going to require another fairly comprehensive staffing job in terms of people and skills, and we wanted to do, in fact, we had to do a better job in staffing the second machine than we had done in the case of the first one. In a fair amount of discussion it became apparent that we should have something beyond the stipulation of a high school education as a condition for employment in order to get people who could adequately staff the jobs and who had the capabilities to move up the Lines of Progression to the top jobs or, in the case of Paper Machines, the Machine Tenders, and it was on that basis that the desire was held on the part of the management to implement some sort of testing program which would be a better guide than the present one that we had, which was the high school education.

To that extent I was involved.

Q I was going to ask what your involvement was in the company's determination for a test. A Well, I will try to reconstruct this as best I can recall it.

Q I just want to know exactly what you did. A I discussed with the personnel manager and the management of the mill the desirability of instituting a testing program

to give the mill a better selection of employees to staff the operations, which was in the planning stage at that point.

Q Did you play a part in the selection of a test? A I did not. I am not a testing expert. I know nothing about the details of tests.

Q Do you know how the company proceeded to select the tests? A I believe at that point in time Mr. Warren was the personnel manager. He had some considerable background in testing and in testing procedures, and I believe that a fair amount of the groundwork, specifically as it involved the tests which were later put into effect, was his judgment and recommendation.

Q Do you recall the first test that was instituted by the company, the name of the test? A I do not.

Q Do you recall whether the employees in the B Paper Mill, Paper Machine Line of Progression, were required to go back and take the tests? A In the B Paper-Mill Line of Progression?

Q Yes. A Prior to the institution of the tests on a regular basis, is that your question?

Q No, at the time you instituted the tests you had already opened the B Paper Mill Department? A That's right.

Q Did you require the employees at the B Paper Mill, Paper Machine Line of Progression, to take the tests? A We did not require it. Actually in an effort to validate the tests which were used we had to have some yardstick in which to determine whether the tests that we were going to consider using had any validity in terms of the types of things we were looking for.

We had an agreement with the union on a volunteer

basis that the members of the B Paper Mill crew would take the test in an effort to establish a cut-off point, if you will, or a validation of the two pieces, as I recall, of the tests, to be used as a guideline for subsequent validation of the tests and implementation of it as a requirement of pre-employment in that Line of Progression.

Q Now do you know the procedure that you followed in trying to validate the tests? A Well, I could tell you what I know about it. What was done by agreement between the company and the union on a volunteer basis as I recall, every member of the B Paper Mill Lines of Progression, the Paper Machine and the Stock Room agreed on a voluntary basis to take the tests that was being proposed on the condition that the scores of individuals would not be identified to supervision and that in no case would the results of the tests be detrimental to the position of anybody who agreed to take the tests on a voluntary basis.

The test was conducted by the personnel department on a group basis, shift by shift. The paper, answer sheets or whatever was involved in it were taken by the personnel manager. The things were graded and those numbers were never knowledge to anyone in supervision in the mill. It was done on a voluntary, cooperative basis between the company and the union.

Q And you are stating that the employees in the B Paper Mill participated in the testing? A That was the group which we were trying to establish qualifications for, so that was the logical group to take the tests.

Q Did the employees in the A Paper Mill take the test? A They did not.

Q Did the employees in Wood Yard Department take the test? A I do not know.

Q Did the employees in the Boiler Room Department take the test? A I don't know.

Q Did the employees in the Pulp Mill Department take the test? A I do not know.

Q The only employees taking the test were the employees in the B Paper Mill? A That was the only one I was interested in.

Q Did any negro take the test? A So far as I am concerned at that point in time they did not, since none of them were in that Line of Progression.

Q I believe you stated you were giving the test, a voluntary test, to select the score or the cut-off score to the employees of the B Paper Mill? A It was an attempt to validate these two tests, whatever they were. It was to determine what would be an acceptable level in light of employees on their jobs and their relative performance on those jobs.

Q How did you select the cut-off scores? A I don't know that.

Q All you know you gave the employees the test in the B Paper Mill? A That's right.

Q You don't know how the cut-off score was selected? A We had already agreed we would not know the score, and I did not know the score of anyone who took it, nor did anyone under my supervision. That was a part of the agreement.

Q Did you know or did you subsequently learn the cut-off score? A I did not.

Q Do you know presently the cut-off score? A I do not.

Q. You don't know how then you selected the cut-off score? All that you know is that you had these employees take these tests? A That's right.

Q You indicated that you considered the job performance of the employees? A Right.

Q How did you consider the job performance of the employees? A The job performance of each individual employee within the crew was evaluated, and I can say this was a subjective judgment as to how he performed the job which he was occupying. In most of the cases, because we had rotation of people across shifts within the paper mill group, we had more than one supervisor within the B Paper Mill who would be conversant with the performance of each employee on his shift. That was not true in all cases, but in most cases it was true.

We did, in fact, have each first line supervisor or foreman, together with the assistant superintendent and myself, who had direct first hand knowledge of performance of individuals' job performance, and their ability to progress up the Line of Progression, and this was supplied to the personnel department, I assume, for a comparison of scores.

Q Did you have any written standards or criterions for evaluation of job performances? A We did not.

Q Did you pass personally on the job performance on each individual who took the test? A No, not directly. I was sufficiently far removed that I couldn't. I was not capable of making a first hand judgment of every employee.

Q And each supervisor or foreman made his own determination of a job performance of an individual? A Yes.

Q And you stated this was subjective? It had to be? A No other basis.

Q And you state further that only white employees were tested and evaluated in their job performance? A Only incumbents in the job were tested.

* * *

[DEP. PP. 50-51]

Q You indicated that you felt that the high school education was not the best determinant of job performance. Do you recall why the company continued to use a high school education or a test? A Well, I will go back and qualify what I said about a high school education. The complexities of jobs in some of these Lines of Progression that we are talking about are such that the company was convinced that a high school education was a starting point, and it was a necessity in terms of an individual being capable or qualified to get to the top of the Lines of Progression that a high school diploma was a beginning point, and that was a minimum.

Now there were some high school graduates whom I suspect, I know there were some high school graduates who didn't have the capability to do these jobs either, who didn't have the inate ability to acquire the knowledge necessary to staff some of these jobs higher up in the Lines of Progression.

It isn't an indictment of the people. It's the facts of life, and in a broad spectrum basis a high school education per se doesn't qualify people to be skilled paper machine operators, so the company felt it was necessary to go beyond that in an effort to adequately staff the operation, and that was what was done. That was why we went beyond, pure and simply, the high school education requirement.

Q My question, however, is why you continued to accept a high school education or a test score? A I am not

aware that we did. At the time we are talking about we required a high school education and a test.

* * *

[DEP. PP. 53-54]

Q So you do not know of a comparison of any others who were not required to take the test and the ones that took the test in the B Paper Mill, Paper Machine Line of Progression, A All I can say is, high school education good or bad, we had a far better crew on the second paper machine than we did on the first. For what reason, I don't know, but the performance and skills of the people on that machine in operating practice, the record will clearly indicate that the performance of the operation was extremely better.

* * *

Q Now did you at any time make any correlation between what you describe as the better performance when the new machine opened up in the B Paper Mill and the test score? A I told you I did not.

* * *

[DEP. PP. 60-61]

Q How do you go about promoting efficiency in production at the Albemarle Paper Plant in Roanoke Rapids? A Well, I would say you put together the best possible management personnel. You staff the operations with the best available work force, and you provide them with the best tools which your money allows you to acquire. You put those tools and people together and attempt to manage them on an as efficient basis as your knowledge allows you to do.

* * *

[DEP. PP. 68-80]

By Mr. Lowden: Cross Examination

Q What changes were made in the mill in the early 1950s? A Well, in terms of equipment, when I went to Roanoke Rapids in 1952, the mill as I recall had a productive capability of about 300 tons a day of pulp and approximately 50 tons a day of paper from the two small paper machines. With the disparity between pulp and paper production being consumed in the Richmond operation, which we shipped pulp to, in 1952, when I went to Roanoke Rapids, that was the situation.

In 1953 we started up the B Paper Mill in terms of the No. 3 Paper Machine which was a production unit capable of 200 to 250 tons of production a day, and we had essentially installed about 6 million 500 thousand dollars of equipment to produce this paper.

We obviously had to build up the productive capabilities of the pulp mill in order to sustain production for the three paper machines there and three in Richmond, for which we had to still produce pulp; so there were rather broad changes in the plant actually.

There was a substantial investment and a lot of new equipment, a lot of sophisticated equipment which was new and different to us, new and different to the industry.

The technology of the pulp and paper industry at that point was moving ahead as rapidly as within any 5 or 6 year history of the industry, so the mill in terms of equipment and in terms of jobs and in terms of opportunities changed substantially during the early 1950s.

* * *

Q It was at that time that you instituted the requirement of a high school education? A The technology of

the industry having moved, the demands of the skills were changing drastically. People who could operate what I would chose to call horse-and-buggy type of operations could no longer do those types of things. In the Paper Machine, for example, a Paper Machine producing 10 or 15 tons a day is a small, slow-moving installation. It doesn't require the knowledge, the skills to the same degree that are attendant to a machine which is moving at speeds of 1,500-1,800 feet a minute, which a man can no longer depend on his eyesight, on his feel for the job, but he rather must rely on what has now become substantially sophisticated technical pieces of equipment in order to staff the jobs and man it, so the requirements for skills at this time changed just as did the hardware.

Q The No. 3 Paper Machine, at the time that you staffed that, would you go over again just how you went about doing that? A No. 3 Machine?

Q No. 3 Machine, yes. A In the staffing of the No. 3 Machine, we took an inventory essentially of the skills and the people which we had in the Albemarle organization, both in Roanoke Rapids and in Richmond. We determined that we had a small nucleus of people who were performing in the A Paper Mill at Roanoke Rapids who had a capability in our judgment to perform certain jobs in the B Paper Mill.

For instance, a man who had been a machine tender, the top man in the line in the No. 1 paper machine, I remember specifically was transferred to the B Paper Mill as a back tender on the No. 3 machine, one step down the line in terms of progression, but in our judgment had the ability to learn that job and ultimately to progress to the top job on that line. He did exactly that, that particular individual.

In the course of the thing we determined that we had a limited number of people who had these abilities in the Roanoke Rapids plant. We then looked to the Richmond operation and we transferred some 6 or 7 out of the Browns' Island and Hollywood operation to Roanoke Rapids to similar jobs on the No. 3 paper machine.

We still didn't have enough skills to staff a machine. We went out into the industry where these other skills were, and we hired people. I testified earlier, as far away as Antioch, California, and we hired one or two people from the Union-Camp plant at Franklin, Virginia and we hired one from a plant at Mobile, Alabama and from the plant in Pensacola, Florida, specifically qualified skilled people to fit into these lines in the upper echelons.

Having done that, we then made available the remaining openings to other people within the Roanoke Rapids plant on a basis that they could request transfer and, if they, in the judgment of the company, were capable of filling these lower jobs and then progressing up the line, then we considered those for those jobs.

Having done all that, we still didn't have enough, and we then went to the outside and we stipulated that these people must have high school educations.

Q Now I believe you testified that as a result of the experience in staffing the No. 3 machine, you were dissatisfied with the method of selecting people? A Well, I don't know that I could agree that we were dissatisfied. We were less than pleased with the results.

Q All right, can you explain that a little more in detail? A Well, some of our judgments as to peoples' ability to progress along the Line of Progression simply didn't pan out. People who we thought had the capabilities to move

ahead and learn the jobs in an orderly sequence simply demonstrated by their performance they did not have this ability, and those that had transferred from other departments, some were actual transferred back to the department from which they had originally come, and others were eliminated through just normal attrition.

There were some people we hired from the outside new to the operation, from a physical standpoint, from an interest standpoint, despite the fact that they were high school graduates, it simply wasn't their cup of tea and didn't want to do this kind of work and did not perform well. I wouldn't say we were completely dissatisfied, but we were less than pleased with the way it came out.

Q Then, if I understood you, the next step in between the time you had the staffing of the No. 3 Paper Machine and before you began staffing the No. 4 Paper Machine the tests were instituted for people who were going to come to the No. 4 machine? A This is correct. We were seeking some measure, some yardstick. I guess we could argue about whether it was a good yardstick or a bad one, but it was a yardstick available to us which we thought was better than what we had been using, and we implemented the testing procedure which has been talked about before, purely and simply, to attempt to change the direction of our experience relative to the first machine, hopefully, to not have the mortality rate among people who came on to the job.

It certainly doesn't work to the company's benefit or to the people either to put them in jobs which they are not qualified to do.

Q Turning your attention to the Lines of Progression, not specifically these, but the ones that were in existence, in practice say in 1952, were these lines in your opinion established on the basis of the racial characteristics of the

people or were there other reasons for the development of those Lines of Progression? A In my judgment there was never any conscious attempt to look at Lines of Progression within the framework of race at all. You must understand that the problems attendant to the operation of a pulp and paper mill and its complexities require that you have an orderly evolution and an orderly training program, and most of our training must be done on the job.

We must have a device by which we can move people along the progression from the lower jobs to the higher ones and they must have an opportunity to be trained in the course of doing this. This is the reason for the Lines of Progression.

They have no basis in race as far as I am concerned or that I am aware of, and as far as I am personally concerned, whenever these things were started, whether 1952, 1954, as far as I am concerned none of these Lines had any basis for saying that these people go in this Line of Progression or this job because they are negroes or because they are whites. They were put in these Lines of Progression and moved along this way because in the opinion of the management of the company they had the ability to perform this job or that job and they had the capabilities to move from this job to that job, and I am bound to say at this time some of this had to be subjective. It didn't have a genesis in race.

* * *

By Mr. Chambers: Redirect Examination

Q With going right back to what you just said in your denial of consideration of race and establishment of Lines of Progression, the company has submitted in its answers to interrogatories, and I would like for you to

explain why you have only Negro employees in the Service Line of Progression in the Wood Yard Department? A Mr. Chambers, I think it is important that we understand what, at least, what I understand and other people have testified in this case, I understand. We are working with a group of people primarily in the Roanoke Rapids general geographical location. Some are Negroes; some are whites. Within the framework of that group of people down there we have people who have historically, conceivably been denied opportunities for education and these sorts of things, which I am perfectly willing to agree have happened. I don't feel that this company can be held 100 percent accountable for the fact that these people have not in all cases gotten an education or been denied an education or had a desire to get an education or a desire to equip themselves to accept jobs requiring certain skills in our industry or in anybody else's industry.

The facts of the case are we have to work with what is there. The Negro population in the Roanoke Rapids area, by and large, does not have from an educational standpoint in many cases, in most cases, in the majority of the cases in the Roanoke Rapids area sufficient educational qualifications to meet the job requirements of many of these jobs in the Lines of Progression.

They do have the qualifications and ability to do some of these jobs, and I think the records at our mill at Roanoke Rapids will clearly suggest that there have been opportunities for these people of limited background, which I cannot criticize them for, and I don't think this is a result as far as their own efforts are concerned that they haven't gotten these things, but the fact is these things exist, and that is what we have to work with. These people have filled the jobs and have done the jobs which they were cap-

able of doing, which their qualifications equip them to do, and I don't suggest to you, sir, for one minute that these happened to be because they were negroes or because they were whites. There are white people in that mill who don't have these capabilities or qualifications either.

Q At one point there, will you explain why they are in different Lines of Progression, the whites who do not have the capabilities or qualifications? A I think this is the more of the times which we find ourselves. Certain jobs have been considered within this plant negro jobs over the years, going way back prior to my going there and, as such, the social mores of the society said these are negro jobs, and we couldn't get white people to fill those jobs. I am not suggesting that it is right or wrong. I am suggesting only that that is a fact of life. That is something that has occurred, right or wrong, which I submit we are not, cannot be held liable for that.

Q You are admitting then that you did have negro jobs and white jobs at the Roanoke Rapids plant? A I am suggesting that we had Lines of Progression which happened to evolve in completely or predominantly the negro on the one hand and completely or predominantly the white on the other. I submit this evolution did not have the genesis in race per se.

Q Then you are speaking from your knowledge of how they had their evolution? A I can only speak from the point that I have direct knowledge, and that is from my experience in the mill this is the way it evolved.

Q Are you stating that all negroes at your plant are incapable of filling jobs which are filled predominantly by whites? A I did not say that or infer it.

Q Would you say that in your Yard Crew Department you have no negroes in the Wood Yard Department who can perform one of those job positions, and even including the top position?

Mr. Lowden: Top position of what?

Q Yard Crew Line of Progression? A Are you saying that none of these negroes in this line could perform in these lines? Is that your question?

Q That is correct. A I can't testify to that. I don't know.

Q You made a statement just a moment ago that in your experience in the Roanoke Rapids area the negroes were incapable of performing the jobs that are predominantly filled with whites? A I didn't say that, I don't think.

Q Are you saying that? A No, I don't say that.

Q Are yau saying that there are no negroes employed at your plant which were capable of performing jobs that are filled predominantly by whites? A I suspect that there are some.

Q Then can you explain why they are not in the white Line of Progression? A I can only surmise.

Q Would you give us your reasoning or opinion on that? A I would suggest that they haven't indicated an interest in being in those Lines of Progression.

Q Is it your testimony now that the negro employees have not indicated an interest in the Yard Crew Line of Progression and that is why they are not in the line? A I cannot testify direct to that, but I can tell you in terms of B Paper Mill, which I am thoroughly familiar with and

have been for a number of years, that this line was from 1953 to this date, so far as I know, staffed almost completely with transfers from other departments.

Q We are going to come to that, but first of all with the Wood Yard Department, in your general statement in answer to Mr. Lowden that you do not think that your Lines of Progression were racially oriented— A I do not think that.

Q I was trying to get the basis of your opinion and trying to get some explanation for negro Lines of Progression and white Lines of Progression, which I think your previous testimony indicated existed at the Roanoke Rapids plant. A Well, again I don't know how to testify specifically to the qualifications of any individual employees in the Lines of Progression in the Wood Yard Department.

Q Then your answer to Mr. Lowden's question has to be taken with that qualification; is that correct? A In response to Mr. Lowden's question I was not attempting to recite specific cases relative to individual jobs within any department of the mill. I was attempting to respond to his questions within the general framework of what I believed to be the genesis and the evolution of the Lines of Progression as presently existing in Roanoke Rapids.

PLAINTIFFS' EXHIBIT NO. 58

Moody Deposition

The following excerpts are offered in evidence by plaintiffs from the deposition of Joseph P. Moody, taken by defendants November 9, 1966. Each excerpt is preceded by a reference to the page of the transcript from which it is taken. Questions are by Defendant Albemarle Counsel unless otherwise noted.

* * *

[DEP. P. 4]

Q Would you state your name, please? A Joe P. Moody.

* * *

[DEP. PP. 6-7]

By Mr. Chambers:

Q Before you began working for Albemarle Paper Company, did you work for any other employer? A Yes, I used to work for the city.

Q What city would that be? A Roanoke Rapids City.

Q What type of work did you do there? A I used to clean up aside of the streets, clean up leaves, help pour cement—anything like that.

Q Did you ever work for anyone else? A Well, I used to farm—practically all my life—raised up on the farm—cut a little pulpwood.

Q Who was your employer? A Farming, you mean?

Q Yes. A I farmed some for Mr. Hubert Floyd. He's dead now. After I stopped farming, I went to the pulpwood—cut a little pulpwood for Mr. Biddy Shaw. Then,

I left there and went to the city and then after I left the city, I got a job with Rust Engineers down here on this No. 3 mill at Albemarle Paper Company. After I left there, Mr. Buster Seay, Personnel Manager at Albemarle Paper Company, he was up on the yard one day and I asked him about a job. He told me to come over next morning—"see about staring you to work."

* * *

[DEP. PP. 47-48]

Q What type of education do you have, Mr. Moody? How many grades did you attend school? A Well, I started to go to school, never got out of the primer.

Q In which grade did you finish your education? A I never go none much.

Q Did you ever finish the first grade? A No, I did not.

Q Have you taken any courses since you have been working for Albemarle Paper Company—correspondence courses, night courses or any type of courses—to improve yourself? A No, I have thought about going to school a couple of times but all my knowledge of the (I am not bragging, hope people don't think I is bragging on the little understanding I is got) that my understanding that what I received come from the Man above. He and I deals a lot together and He shows me which way to go.

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PLAINTIFFS' EXHIBIT NO. 60

Hill Deposition

The following excerpts are offered in evidence by plaintiffs from the deposition of Henry Hill, taken by defendants November 9, 1966. Each excerpt is preceded by a reference to the page of the transcript from which it is taken. Questions are by Defendant Albemarle counsel unless otherwise noted.

* * *

[DEP. P. 108]

Q State your name, please. A Henry Hill.

* * *

[DEP. P. 113]

By Mr. Chambers:

We would like to tender an objection for the reason that the witness has the same problem that your former witness had. He cannot read.

* * *

PLAINTIFFS' EXHIBIT NO. 61

Mitchell Deposition

The following excerpts are offered in evidence by plaintiffs from the deposition of Arthur Mitchell, taken by defendants November 9, 1966. Each excerpt is preceded by a reference to the page of the transcript from which it is taken. Questions are by Defendant Albemarle counsel unless otherwise noted.

[DEP. P. 125]

* * *

Q Will you state your name, please? A My name is Arthur Mitchell.

* * *

[DEP. P. 127]

* * *

Q In what manner do you believe the company is discriminating against you? A Well, what I think about it, I work all them many years there, and that is all you might say I know how to do, and they take me out of there and put me in a different place doing something I can't do. That is the part I don't think was right.

* * *

[DEP. P. 132]

* * *

A Well, they didn't never call me no more. After they told me then, didn't never call me for to take no tests.

* * *

PLAINTIFFS' EXHIBIT NO. 62

Katzell Deposition

The following excerpts are offered in evidence by plaintiffs from the deposition of Raymond A. Katzell, taken by Defendant May 21, 1969. Each exceprt is preceded by a reference to the page of the transcript from which it is taken. Questions are by Defendant Albemarle Counsel unless otherwise noted.

[DEP. PP. 2-8]

Being first duly sworn, was examined and testified as follows:

Examination by Mr. Lowden:

Q Dr. Katzell, would you please state your name and address for the record, please? A Raymond A. Katzell, 1 Barry Drive, Glen Cove, New York.

Q Your present occupation? A I am a psychologist.

Q Are you connected with New York University? A Yes. I am Professor of Psychology and head of the Department of Psychology at New York University.

Q Doctor, this case involves a charge by certain Negro employees at the Roanoke Rapids, North Carolina, paper mill, the Albemarle Paper Company, and the case has been going on for some time. And we asked the plaintiffs some depositions, one of which was: state the names of people who have knowledge of the case, and in answer to that they did not include your name, but included Mr. Richard Barrett. But we were subsequently told that should have been you. So that—in order to shorten this down, I would like for you to state for the record the general areas in which you

have knowledge of this case. A Well, I have read some of the trial testimony that has been taken earlier—the testimony of Mr. Palmer and Mr. Bryant. I have also examined certain other documents that describe the organization and the progression lines of the paper mill. I have been given some general oral information about the context of the case and the nature of it by Mr. Robert Belton who is an attorney with the [NAACP, Legal Defense Fund,] and also had some conversation with Mr. Chambers.

I believe this would represent the major source of information that I have about the case.

Q And did they employ you to testify in the matter? A Yes, they have.

Q And is the area of your testimony going to be limited to testing or are you going the testify about other matters in addition to that? A As I understand, it is the former; it is the area of testing.

Q So that you and I can just talk about that then. Doctor, as a psychologist, I assume that you are familiar with the Beta—let me get the name of it right—you are familiar with the Revised Beta Examination? A Yes, I am.

Q Are you familiar with the development of the Beta Test which was originally developed by the Army in World War I? A Yes, I am.

Q Could you describe for us how the original Beta Test was developed? A Well, an effort was made to develop various pictorial and other kinds of non-verbal questions so that a test of mental ability could be used with military recruits of little or no literacy. I don't recall the names of the principals who [were] involved in actually devising these kinds of questions, but they were psychologists asso-

ciated with the United States Army, World War I. And the test was administered to large groups of recruits in the Army, and related, among other things, to the military occupations that these recruits—military and civilian occupations—that these groups occupied.

Q And the purpose was to measure an individual's intelligence? A Yes, general intelligence and general mental ability.

Q You would say it was originally devised—the examination was professionally developed? A Yes, I would.

Q Now, it's been revised once or twice by Mr. Kellogg and Mr. Morton, in the early thirties, and then I think I have—the one that I have in my hand was revised in 1946. Do you have any knowledge of Mr. E. C. Kellogg and Mr. N. W. Morton? A None, other than their association with this particular test.

Q Do you know if they are psychologists? A I do not.

Q Would you say the revisions were professionally developed? A It is my impression from the information contained in the test manual that it was professionally developed, yes.

Q Does the Beta Examination and the Revised Beta Examination have a high correlation with individual tests of intelligence? A It has a substantial correlation. I wouldn't characterize it as high, for that is a matter of word meaning.

Q So that you—it would be your opinion, then, if I could summarize it, it would be your opinion that the Revised Beta Examination has a high correlation with in-

dividual intelligence and that it is an attempt to do that by means of a culture free examination? A I didn't use the words "culture free." It is an attempt to do so by means of a non-verbal examination.

Q Would you know what would be the average raw score—I believe the right words are—of an average high school graduate on the Revised Beta? A No. I don't remember the specific figures.

Q I will hand you a copy of the Revised Beta Manual and ask you what the correlation is with the Otis S-A Test?

Mr. Chambers: I don't understand that question.

Q (Mr. Lowden) Do you understand my question? A Yes, I do. According to Table VI, on page ten of the Manual, a correlation of .71 is reported for a group of 198 subjects between the Otis S-A Test of Mental Ability and the Revised Beta.

Mr. Chambers: Was the question the correlation between the Otis Test and the Revised Beta Test?

A Yes.

Mr. Chambers: I take it that Dr. Katzell was being asked about a document entitled "Revised Beta Examination Manual," Revised 1957?

A Yes.

Q (Mr. Lowden) Doctor, are you familiar with the Wonderlic Personnel Test? A Yes.

Q Could you tell us what that is a test of? A It is also a test of general mental ability, however, this, unlike the Beta, is a test which uses—is substantially verbal in nature, but purports to measure the same general kind of intellectual capacity.

Q Unlike the Beta Test, if you also gave a person the Wonderlic Personnel Test, would it give you some idea as to whether or not they can read and write, more so than the Beta Test would? A Yes.

Q Can you tell us how the Wonderlic Test was developed? Would you like to look at this? A It was developed by Mr. E. F. Wonderlic, whose name it bears, and by recollection it was—the nature of the items were derived from various other kinds of mental ability tests which had prior been used as vocabulary, word meaning, [verbal] reasoning items, arithmetic reasoning, for example.

Q To shorten the question: do you know—would you say the Wonderlic Test was professionally developed? A Yes, I would.

Q And you agree it does measure intelligence? A That, Mr. Lowden, as you perhaps know, is a question that isn't readily answered, because psychologists are by no means in agreement of what intelligence means. I would—if you could rephrase your question—

Q All right. A —as to whether this is a representative of a type of test intended to gauge general mental ability, ability to learn and think in abstract terms, I would answer: yes, that this is a characteristic example of that type of test.

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[DEP. PP. 12-20]

By Mr. Chambers:

Q In your work with the United States Department of Labor have you performed any services in connection with the development of testing guidelines for the Office of Federal Contract and Compliance? A Yes, sir. In the

process of developing the order, the executive order [on validation] of tests for employment purposes, the Office of Federal Contract and Compliance invited a number of specialists from industry, education, labor unions, to meet with them from time to time to propose the features of that order and to review drafts. I had some service in that capacity. Last fall I was asked to serve as co-chairman of an advisory committee on selection and tests which the OFCC established to assist in the administration of the—well, administration and interpretation of the order which was issued last September by then Secretary of Labor Wirtz. I accepted that appointment and I am still so serving.

Q Now, the order that you are referring to, was this order dealing with testing by industries receiving contracts with the federal government? A That is correct.

Q Testing of employees? A Correct.

Q Or applicants for employment? A Correct.

Q Have you in your work performed any services for the Equal Employment Opportunity Commission in connection with its guidelines for testing? A No, I have not, although in my work with the OFCC I have conferred with representatives of the EEOC.

Q About their guidelines? A About their guidelines, yes, sir.

Q Was your—one of the objectives of the work by the OFCC in connection with testing to establish some guidelines to prevent racial discrimination by employers? A That is correct.

Q In the use of tests? A That is correct. Tests and other selection procedures, I might add.

Q Do you recall the most recent guidelines of the OFCC? A Yes.

Q For testing? A In general terms I do, yes.

Q Do you recall the date that that set of guidelines— A I believe the date was 1966.

Mr. Chambers: For the record, we have a set of guidelines from the OFCC. A From the OFCC or EEOC?

Mr. Lowden: From the OFCC.

A Was your prior question about OFCC or EEOC? I'm sorry. I thought you were asking about the EEOC. The 1966 date—the OFCC order was issued [in 1968].

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Q (Mr. Chambers) Dr. Katzell, in connection with the guidelines for testing, one of the questions put to you by counsel for the defendant about the Revised Beta and Wonderlic being professionally developed, would you state for the record what you understand "professionally developed" to mean? A The term is used in somewhat different senses. My interpretation of the sense in which Mr. Lowden—the sense in which Mr. Lowden intended the question is whether in the process of constructing the test originally professional considerations guided the selection of items and checking out their suitability, and it was in that sense—my interpretation of that sense of the question that I answered in the affirmative, that it was my opinion that it was professionally developed. The term "professionally developed" has also been used in a broader sense to refer to the degree to which professional standards have been applied, not only to the construction of the instrument itself, but the way the instrument is applied in arriving at determinations of its suitability for personnel decisions. In

other words, in the latter sense the term is used to cover not only the original construction of the instrument, but whether the whole procedure of its utilization was professionally developed, which would include not only its construction but the extent to which evidence was secured in a local situation as to the validity of the test, its reliability, and the determination of norms regarding how applicants or employees of that organization performed on the test.

Q So, for us laymen, professionally developed could mean that a group of professionals got together and devised a test, following the procedure that is considered to be standard procedure for developing a test? A Right.

Q And it could also mean, for us laymen, the use of the test to insure validity in measuring what you want to? A Yes. The distinction is whether the instrument is professionally developed or the program for the use is professionally developed. That is, one could have a professionally developed instrument which then is abused by incompetent people in building this instrument into a selection program, and if that were the case, I don't think it would be appropriate to say that the program of testing in a given organization was professionally developed, even though a professionally developed instrument may be used as part of it.

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Q (Mr. Chambers) Dr. Katzell, in your development or work on the guidelines for testing for OFCC, was it your understanding that professionally developed tests which are permitted to be used under the guidelines would include both those that are professionally developed in terms of the way that the questions are selected, and so forth, and also the professional use of the test?

Mr. Lowden: Just—before he answers that, we take the position that what is—OFCC does has no relevancy because this is a Title VII case.

Mr. Chambers: You can still answer it, Doctor.

A Yes. The OFCC order addresses itself primarily to the way in which tests are used, that is, the way they are actually built into a program of selection rather than to the mechanics of devising the instrument.

Q (Mr. Chambers) Would that also be true of the guidelines for testing of the Equal Employment Opportunity Commission? A Yes, it would be in my judgment.

Q Have you published any material relative to testing, that you have had published? A Yes, I have.

Q Do you have your Vitae with you? A No, I do not.

Q Could you name some of the publications? A Yes.

Q At this time, Dr. Katzell, rather than go through the list of publications, I will show you a document entitled "Testing [and] Fair Employment" and ask you if you were one of the co-editors of that publication? A One of the co-authors.

Q Co-authors? A Yes.

Q Now would you state, for the record, what the purpose of this study was? A Yes. This document you have shown is a—is [primarily] a report of a research project conducted by myself and my colleagues at New York University under the auspices of the Ford Foundation, the study having had the objective of determining in a sample of work situations the extent to which tests were or were not similarly valid for different ethnic groups, and whether or not

there was evidence of unfairness of the test when applied to members of different ethnic groups.

Q Did you find in your study any differences in the performances of various ethnic groups on certain tests? A Yes, we did.

Q Did you find in your study any fallibility on the correlation of test performances by various ethnic groups and their performances on the job?

Mr. Lowden: Would you read the question?

(Question Read)

A Well, I am not sure I understand your question.

Q (Mr. Chambers) Let me rephrase it. Would you tell us what you found in your study? A Well, one thing we found was that there is not a stable picture about the validity of tests for ethnic groups or the fairness of such tests of different ethnic groups from one situation to the next. In other words, we did find instances where there were—the tests were equally valid or invalid for different ethnic groups in the sense that the job performance of members of one ethnic group [was] not underestimated on the basis of their test scores. In other words, their job performance was in line with their test scores just as the job performance of other ethnic groups [was] in line. We also found [instances] where members of one ethnic group might tend to get lower scores on the test but not perform their job less adequately, and instances of the latter sort were those that we identify as being unfair to members of the group that obtained the lower test scores.

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[DEP. PP. 27-48]

Q What are your views on the value of paper and pencil tests for selecting personnel? A Well, I generally believe that paper and pencil tests can potentially be a highly useful technique for determining the qualifications of job applicants or candidates for transfer or promotion, and both in my own experience and through many citations in the literature of the field, we know of instances where paper and pencil tests have been found to be substantial indicators of the suitability of a person for performing a job. However, we also know that whether or not a paper and pencil test will, in fact, have the utility that it is potentially capable of having depends on its proper utilization. So that one can't on a blanket basis say that all tests are useful under all circumstances or no tests are useful under any circumstances. [Simply]: potentially the strategy of testing can be [useful] if properly [implemented] according to certain professional standards which have been developed in the field over [the several decades that], the tests have been used for selection.

Q What, then, would be some of the conditions of proper use that would make tests desirable? A Well, the critical point is that the test must be job relevant. Now, to be sure that a test is indeed job relevant, that it does indeed indicate the suitability of placement for a given individual in a given job, there are certain procedures that are widely acceptable standard procedures for doing this. For example, an initial critical step in developing a testing program for personnel selection is to study the job or jobs in question very thoroughly as a basis for estimating those human capabilities and traits that are critical to the adequate performance of the job. This is a step that in the parlance of the field is spoken of as job analysis.

On the basis of such a careful job analysis an experienced test specialist can surmise tentatively what tests may have the capacity to measure the abilities and traits that are apparently germane to that job. That is a matter of judgment, of course, still at this stage. It depends on the test specialist's [assessment] of the relevant characteristics based on his job analysis, and it is always a matter of judgment based on his knowledge of tests and which tests in the past, through research, have been shown to have some accuracy in assessing the particular qualities in question. In order to see whether these judgments or surmises are in fact true, it is necessary to conduct a validation study. A validation study in effect consists of studying a sample of employees by means of a test, that is, administering the test to the sample of employees, and also obtaining one or more criteria of their ability to perform the job. These may be production records; they may be ratings by supervisors who have intimate knowledge of the work performance of the individuals in question, and the like. The study then consists of determining the extent to which the scores that people obtain on the tests are correlated with or paralleled by their performance on these indicators or criteria of job effectiveness. If the result is that the test scores do in fact parallel the job criteria, that is, those people who get higher test scores are also those whose ratings of job effectiveness are higher, and those of lower test scores are those whose ratings of job competence are lower, then in the terminology of the field we speak of such a test as being valid. It is valid to the extent that the scores on the tests are correlated with criteria of actual job performance. So this is a critical step, to see whether in fact this validity exists.

It is possible, of course, and it is not infrequently the case, that a test which in the judgment of the test specialist appears like it may be valid for a job turns out not to be

so, and [when] actual validation study is performed. This is because, for some reason, the specialist made misjudgment of the element involved.

If the test is found to be valid on the basis of such a study, another important step is to determine what level of test performance seems to be, such as to differentiate those who are likely to be good job incumbents from those who are likely to be less satisfactory incumbents on the job. And this is often called a cut-off score or a critical score, and this again is empirically determined from the data; by comparing the scores of the better performers on the job with the scores of the poorer performers, or of the scores of those succeeding with those who fail, it is possible to determine a score or range of scores that distinguishes those of the greater likelihood of success and those with the poorer likelihood of success and to use this as a guide in the future personnel decisions of new people that come along and take these tests.

So that, to summarize the three critical steps, the performance of the job analysis, the validity study of the test presumed to be—assumed to be helpful on the basis of the job analysis to determine whether in fact the tests are valid, and, thirdly, the determination of scores, cut-off scores, to serve as guides for judging the—whether an employee's performance is such as to lead him likely to be an acceptable or unacceptable employee.

* * *

Q (Mr. Chambers) You spoke of job relevance. I gather you were talking about job analysis, or what do you mean? A Yes, I think all of these steps that I described are important to determining whether or not the test and the standard of employment based on the test are in fact relevant

to the individual's job capabilities. And if—if these steps were not performed, or not performed satisfactorily, there would be a high risk that the tests were not in fact job relevant, that is, that a person's score on the test cannot properly be taken as an accurate indicator of his job suitability, or that the standard that was used in judging him might be one that excluded him from the job when, in fact, the data might show that he in fact possessed enough of the ability represented by the test so that he could be a satisfactory incumbent of the position. I might add another point in terms of this professional application of tests for purposes of selection. And that is that if the test is going to be used for a sample of job applicants or candidates who are heterogeneous with respect to some characteristic that might affect their test performance, then it is essential test practice to [conduct] these empirical validation studies practically for each of the subject groups of such employees constituting the heterogeneous sample. Samples might be heterogeneous with respect to sex, for example, and it may very well be the significance of a given test score for a woman might not be necessarily the same indicator in terms of job suitability as for a man, or more appropriately, as the case before us here, it is also quite possible that the test scores don't have identical meanings for a sample of culturally disadvantaged or educationally disadvantaged persons as compared to a sample of culturally or educationally more advanced persons. And the guidelines that are applicable in such instances, then, is to separately ascertain for each of the ethnic or culture groups involved what degree of validity there is between the scores on the test and criteria job performance, and, also, what is the relevant cut-off score or differentiation of those who are more likely to succeed from those who are less likely to succeed.

I wonder if I might use that to maybe just explain a little more fully some of the terms I have used.

I mentioned before that the term "validity" is used to refer to the degree to which scores on a test correlate with some measures or criteria of actual job performance. The relevance of that concept to this question of dealing with two or more ethnic groups is that it is possible for a test to be suitably valid for one ethnic group but not for another. If that were the case, it might be perfectly acceptable practice technically for the company to use the test for employing people of Group A, but it wouldn't be much point of using the test for persons of Group B, because the test wouldn't have the same relevance to illuminating their likely job performance and therefore would be inappropriate to use for them. Also, the test might prove to be invalid for either group as in the case of the Kaiser group and/or it might prove to be valid for both groups. And we have an example of a set of studies that I was co-author of, an example where the tests were approximately equally valid for two ethnic groups. There is another example that I got into earlier about cut-off scores, to which I referred a little bit. That is the concept of fairness. A test may be valid for two ethnic groups, each of two ethnic groups, and yet it is possible for it to be unfair to one of those groups relative to the other group. That is because it is possible for a test to underestimate the job performance of members of one ethnic group relative to what is [estimated] for members of another ethnic group. Thus, for example, for members of one race it might be that the cut-off scores that differentiate those who are likely to succeed from those who are likely to fail as a score of—just to name an arbitrary figure—of 20, but for the other ethnic group, when it is studied separately, it might be in the neighborhood of —take a score of 15, let us say. That score of 15 would be

equally indicative of ability to do the job as was true of the score of 20 for the other group.

You might wonder why this might be. This might be because there are certain factors in the makeup and background of individuals in one ethnic group that adversely affect their test performance. A test like this would be technically unfair and discriminatory between the groups. And for this reason it is, especially in the light of the Civil Rights Act, and the OFCC, the EEOC, that the psychological profession, having been alerted to these kinds of problems of fair employment, is now accepting as a guideline for satisfactory professional practice the separate validation and the separate determination of cut-off scores for the various ethnic groups that are present in the labor force or potential labor force in appreciable numbers.

Q Now, Dr. Katzell, if you were an employer and considering instituting a test as a requirement for an employee, would you just give us the steps that would be generally accepted in the profession for the employer to follow in selecting and instituting the test? A I think that this is a technical area. Amateurs in it are too likely to make mistakes. And I think an employer would be well advised, if he were planning to institute testing programs, to see that he had the guidance and counsel of experienced personnel and testing personnel. I think if he did that, he would find that the advice given to him, or the work done by this employee that he brought in to do this work for him, would follow pretty much the lines that I have mentioned earlier. That the test specialist would, first of all, try to identify in which areas of employment there are—there do seem to be [selection] problems and where there are some evidences that whatever methods you are now using don't yield satisfactory employees, and having identified cer-

tain kinds of jobs and certain ladders of progression [where] there seem to be a high frequency of unsatisfactory employees. We might then take these as our target to see whether we couldn't develop a testing program. Once having identified those, we would go through the steps that we have indicated before, that is, doing this job analysis, trying out the tests that seemed to be suitable on the basis of job analysis on a sample of either current incumbents trying to test them on some [applicants], trying to follow them on up after placed on the job, in both instances to see how the test works out when compared to some distinct separate measure of job success or job [effectiveness; then we would analyze these data] to see whether the validity is sufficient to be able to warrant using on [the tests] for personnel [decisions. If there were] heterogeneoused—at least two ethnic groups present in some appreciable number, then to undertake to see that the validation study was done separately on each of the ethnic groups involved.

And, also, that I would check to see that the cut-off scores that were established on the basis of the test were indicative of the same probability of job success for each of the ethnic groups involved.

Q Let me see if we can put that in layman's terms. Let's start, first of all, with the job analysis. Would that include the determination of what the job position would require in terms of what the employee would actually do in the job position? A That is correct.

Q In other words, the employer would take Position "A" and determine what the employee would do in Position "A"? A Include a description of the actual abilities and behaviors that an individual performs in accomplishing this job, the responsibilities and duties. Beyond that, it also involves an assessment of those knowledges, skills, and

other human traits and characteristics that are entailed in performing this job. So it is what does the individual do and what kind of a person must he be in terms of his knowledge and aptitude, and [some] in order to do—to be able to do and execute those responsibilities competently.

Q And if one were looking at a department, one would look at all the job positions in a department; if one were going to use a test in selecting employees in a department, one would look at all the job positions within the department? A Yes. Certainly, those that were related in terms of some progression ladder, because, typically, when one wishes to consider an employee, he considered him not only from the standard of his initial position, but if there is some likelihood that he is going to be progressing in that ladder with reasonable rapidity, then he would be considered in terms of his suitability for the next higher job as well.

Q Now, the second point that you mentioned that would be considered in the job analysis, that being the qualities or attributes that an individual would have to have in order to perform a job, would be a subjective determination initiated by the employer to determine what things he really wanted to measure with the test? A Yes. Ideally, this should be done, again, by a professional who is experienced in this kind of thing because the judgment is not easily made. In other words, what I am suggesting is both the determinations of the job duties and the judgments regarding the capabilities involved in performing the job should be made by an experienced individual in the personnel field.

Q Along that same vein, and if one department would require certain attributes, would it necessarily follow that each department within the plant itself would require those same attributes? A No, sir. It would not necessarily

follow. Certain jobs might require different attributes than other jobs, or even if the same attributes were involved, certain jobs might require them at a minimum level that was different from the minimum level involved in another job.

Q In this instance one would be talking about a test measuring different attributes? A That's right. You have different test standards in such a case.

Q Now, after the company had made this job analysis, the next step would be selecting the test to measure those attributes that the company felt were necessary for the particular job or position? A That's correct.

Q And I gather that there are thousands of tests in the field? A That is correct.

Q Now, how would one go about selecting the test? A This again is a judgmental matter. The professional in the field is generally—should be knowledgeable about the way in which the use of the test in the past in other situations has shown it to be relevant to the traits or attributes that seem to be involved in this particular company—the jobs in this particular company. He knows this partly from his own personal experience if he's worked along these lines in the past. And, of course, there is an extensive body of literature in which there have been records of experience with tests being tried out at various kinds of companies—various kinds of job situations, so it would be his knowledge of which tests, based on past experience, have shown some promise of measuring the traits and abilities that appear to be involved in the jobs in question that would lead to decision that the test appears to be promising for use for this particular job, whereas, Test "B", "C", "D", and "E" seem to be less suitable.

Q Now, since we have made the job analysis and have selected tests, or a battery of tests, the next step would be the validation of the test? A That's correct.

Q And I think you defined that as determination of whether there was any correlation between the test performance and the performance of the individual on the job? A Correct.

Q Now, how would one proceed in validating the test, and let's assume the heterogeneous group that the employer was going to pick from? A Ethnically heterogeneous, you mean, for example?

Q Right. A Well, there are two basic strategies that can be followed there. The one that most specialists in this field would generally recommend be followed, if feasible, is to administer this test—let's assume for the purposes of illustration that we are talking about only one test, the same principle that applied when we felt it desirable to use two, three, or four. Let's speak of one for this purpose—would be to administer this test to job applicants or candidates for this type of position and then to make the decision as to whether to hire or not to hire these candidates on grounds other than their performance on the test.

In other words, the test would be administered, and only for try-out purposes anyway, and not as a basis for personnel decisions. After a sufficient number of persons had been hired so that one could have a fairly stable finding based not on just a handful of people, but a substantial sample of 25, 30, 50 people, one would then follow up their subsequent job history to see which—to see how well they measured up in terms of their actual job effectiveness, using one or more of these criteria of job performance to which I alluded earlier. And then one would statistically determine the degree of correlation between the scores

these candidates had had when they were initially hired with their subsequent history of job effectiveness to see whether the test is sufficiently valid. If the sample were ethnically heterogeneous as suggested by your question in making this analysis the members of the different ethnic groups should be analyzed separately to see whether the test is equally valid for the two or more ethnic groups involved. And at the same time, of course, these same data would provide a basis for determining what minimum score level is relevant to [differentiating,] those who experience showed turned out to be the more satisfactory employees from those who experience showed turned out were the less satisfactory.

I did mention there were two strategies. The first, the one that I have just been describing, is call predictive validation, for reasons that you can see, that is, that the test scores are not used as a basis for personnel decisions, but are just kept in the file, as it were, and later determination is made to see how well the scores of these people who—have predicted their future performance.

Now there is another strategy that is sometime followed for the sake of getting more rapid results, because this [aforementioned] predictive strategy is—obviously takes some time before the data can be developed. You have to hire enough people and let them be on the job long enough in order to get the data, and this may be a matter of a year or two years before you have a reading on how well the test is working, and if one, for practical reasons, feels it is necessary to have a prompter or quicker answer for the purposes of validity, then a second [strategy]—which is less desirable on technical grounds, but may be desirable on practical grounds—is adopted, and this is a strategy called a strategy of concurrent validity. That is, here, instead of applying the test to a sample of new job can-

didates, the test is administered on an experimental basis to a sample of current employees who occupy the job or jobs in question, and their scores on the tests are compared with records of their job capability so that the test scores and the criteria data are simultaneously available and could be compared at once, and, therefore, a quicker reading can be made. Technically, this is a less desirable procedure because whatever the process that was used in screening out employees and whatever the processes involved underlying the attributes of employees on the job, it may very well be that some employees who were potentially satisfactory have already been excluded from the sample because you are dealing with a current work group so you don't get as good a picture as you would with the predictive validity strategy.

Q If one selected the predictive analysis approach, would one in the profession begin with using the test as a means for employing persons or just get the test scores and make the determination to employ on some other basis, and then follow the employees to determine the minimum score that one would use? A It would be that latter. That is, ideally, the test should not—since it has not been proved out—should not be used as a basis for the employment decision but some other basis should be used.

Q Would that also be true, Dr. Katzell, of the concurrent approach? A Yes. It is needed in the concurrent approach because of course the personnel have already been employed on some other basis and, of course, the test data were probably not available for them at the time they were hired.

Q Now I gather that during this validation test that one might find that some of the attributes that one con-

sidered to be necessary, and considered necessary to be measured, would not be required for one to adequately—to perform the job? A That is correct. In other words, not infrequently we find that some tests that we thought measured a relevant attribute turns out not to be valid.

Q And one might also find that the test that one initially selected does not really meaure what is necessary for the job? A That is correct.

Q Now could you tell us something about the form of a cut-off score? I understood your testimony that during this validation test or analysis that one would come up with a cut-off score in the process. Now is this a hard and fast inflexible score that is generally used or does it have some flexibility, too? A It is generally not advisable to have a single hard, fast, inflexible score as a cut-off, the reason being that tests—even the best of them—are not a hundred percent accurate. In addition to this, there is the fact that virtually all test professionals will recommend strongly that tests not be used as the sole basis for a personnel decision, so that other factors should be taken into account and, therefore, that if there were strong [basis] from a person's previous work history, for example, that he was a competent employee and his test score was a little bit lower than that of some other [person's where] there wasn't much evidence that this person was a competent employee in terms of his previous job performance, you might give preference to the first of the two even though the test score may be lower, because you should be taking this other into account. So we usually think of ranges of acceptable test scores rather than some single, hard and fast score that is minimally accepted.

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[DEP. PP. 50-53]

Q (Mr. Chambers) Now, Dr. Katzell, looking at the question of the possible discrimination between blacks in testing, would you tell us whether there are any other factors that the profession would take into consideration in selecting the type of test and the procedure that should be followed? You have testified earlier that if one were testing a heterogeneous group, that one might find it necessary to develop different norms for the various groups within it. Now, would you elaborate on that further and tell us why this would be necessary? A It has many times been shown that ordinarily the average score obtained by a group of black people in the United States are somewhat lower than the average scores obtained on the same test by a group of whites coming from the same general area of the country.

The reasons for this are not entirely clear and there are probably a number of reasons rather than just some one reason. Some of these reasons, however, may be of a sort which depressed the level of test performance of the average black without having a similar depressing effect on his actual job capability. For example, in many parts of the country, if not most, blacks obtain inferior schooling to whites, so that insofar as a particular test was likely to be affected by educational background, the black would be at a disadvantage. If the job were of a sort in which this kind of school learning was not particularly relevant, then you could see that the blacks as a group would tend to get poorer test scores without necessarily as a group being less adequate performers on the job. Blacks as a group tend to be particularly disadvantaged on verbal tests. Thus, again, would be—if it were a job that did not rely heavily on verbal skills, verbal aptitudes for adequate per-

formance, as is true in the case of many mechanically skilled occupations, the blacks might be disadvantaged as compared to whites.

It has also been found that blacks somehow do not do as well on tests, under some of the usual conditions that tests are taken, as do whites, and that if these conditions are changed, they might do relevantly better. For example, blacks particularly those in cultural backgrounds where they are not accustomed to having close working relationships with whites, seem to have their performance on tests adversely affected by a white examiner on the test perhaps because such an examiner is seen as a somewhat threatening or anxiety inducing figure even if he doesn't intend to be. Blacks—some studies of blacks have shown that they are not as responsive to performance of tests under highly speeded conditions, as many tests require; that is, where there are tight time limits and performance depends largely on how much you can accomplish within the short time allowed. Now, again this may not be something they carry over to the job if the job didn't have that kind of a counterpart to it.

I have just given illustrations then, and these are by no means exhaustive, of some of the circumstances that may be associated with lower average test performance of blacks as compared to whites that may have no particular counterpart in the actual job condition or job performance. And to the extent that this would [happen, your] empirical validation study, if one were to be performed along the lines that I have already prescribed, could very well show what I have called unfair discrimination, that is, depictive of the black applicant population tends to be lower in relation to this actual job capability than is true of a white population. And if a count were not taken of this difference,

the net effect of this could be disproportionate exclusion of otherwise qualified blacks.

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[DEP. PP. 56-67]

A I wonder if I might comment, before I go on to your next question, on something you were asking a little bit ago and I realized I wanted to add something in the course of giving my comments that I forgot.

You were asking a little bit ago—I guess it was the question before this last set—about the—about some special considerations that might affect testing black people. And I was indicating that there are certain conditions that might depress test performance without necessarily affecting their job performance—was the general thrust of my response. In the course of this I indicated that the average black in most localities gets less adequate schooling, and for other reasons as well, is particularly handicapped in certain other verbal kinds of tests. It has sometimes been assumed that it is possible to avoid this disadvantage for the average black by using so-called culture free or culture fair tests, perhaps of a non-verbal nature or in other ways somehow not getting at things that are too closely related to school background and the other kinds of things that we think are characteristic of the cultural mainstream in this country.

I must say it is my judgment—and I think most psychologists would concur in this—that the search for culture free tests has so far not been successful. The attempt to use non-verbal tests, for example, has not proven a solution to the deficit in test performance that blacks show in relation to whites. Again, the reason is not necessarily that the black man is proportionately less capable than the white man, but it may be something linked specifically to performing on

tests. It may have something to do, for example, with the test environment as I have already explained. Blacks are less responsive to some of the speeded conditions, tend to be more anxious when confronted with an examiner, and so on, and this would be true whether it was a verbal test or a non-verbal test, but beyond the cultural deficit experienced by blacks in their educational background and in their home backgrounds that are related to educational kinds of considerations, transcend simply the disadvantages in using and understanding words because it carries over to a whole set of ability to cope with certain kinds of abstract relationships that are characteristic of the kinds of learnings and mental processes that go along with the advantaged dominant white culture and the kinds of schooling that we give our children. So, that the cultural disadvantaged, you see, is not—for a variety of reasons—is not evaded simply by taking a test that has relatively little verbal contact, because the mental processes involved in coping with verbal type materials can be present also in non-verbal materials.

To illustrate, there are tests such as are included in the specimens that we have been talking about that involve space relationships and you are supposed to match up certain kinds of figures. Well, one way of coping with these kinds of figures is to speak—is to put it in verbal terms, that is, this figure looks like a triangle and this figure looks like a square, and so on, and that in matching up, even though terms aren't verbal, the thought processes are rooted in words, and just by using the non-verbal terms you don't get around the problems of relying on mental processes that have symbolic verbal type aspects to them.

Q Dr. Katzell, you stated earlier that you had had an opportunity to examine some of the documents that have been gathered in connection with this case I think, including the testimony of Mr. Bryant, Mr. Moore, Mr. Palmer, in

addition to answers to interrogatories and other exhibits. Did you in your study of this case have an opportunity to find out the procedure that was followed at Albemarle Paper Company in the institution of the testing requirement there? A Well, the testimony of Mr. Bryant was—contained a fair amount of information about the procedures that were followed in installing the tests, so that—but that is the source of my information. And to the extent that that is an accurate picture of what was actually followed in the company, I think I do have some familiarity with it.

Q Did you find in your study of the procedure that was followed any difference in what you indicated was the normal accepted practice in the Profession? A Yes, sir. There were several respects in which—what I understand the procedure to have been, deviated from the kinds of standards that I have outlined in my earlier deposition.

Q Would you tell us what those deviations are, or were? A Well, of course, there were two different tests—there are two different tests used by the company, and somewhat different procedures, as I understand it, were followed in those two cases.

Let me take first the case of the Army Beta Test. Mr. Bryant referred to a validation study that was performed of that test in the company by, I believe, a Mr. Warren.

It was not clear, however, from his testimony, that there was ever the kind of systematic job analysis performed of those positions in question. And it is my understanding that there are no formal job descriptions that cover that set of jobs that is in existence. The procedure mentioned there of validation corresponds in a general way to what I have termed the concurrent validation procedure, that is, the test was administered to a sample of current employees

of the Albemarle Paper Company. Supervisors' ratings of some sort were obtained. And, according to Mr. Bryant's testimony, apparently it was found that there was some substantial degree of relationship between the scores on the tests and those ratings, although just how high that relationship was is not specified in the testimony.

The sample of positions covered in the validation study is not—likewise, not specified, other than reference to skilled people, to skilled jobs, so it is not entirely clear whether the jobs covered were all the relevant jobs or just some of them, which doesn't necessarily mean that it wasn't a properly conducted study. It just means that it is not clear that it [is] because—conceivably, because if the jobs covered did not adequately represent the range of positions for which the test is being used, then the finding that the test was valid in that set of jobs does not necessarily speak for its validity in the other jobs for which it is being used, you see.

Also, in another respect, the testimony suggests a departure from the standards that [I] have proposed here, and that since there were apparently practically no Negroes employed in those skilled jobs as of the time Mr. Warren conducted the study, we can assume that no separate validation or setting of cut-off scores was done for each of the two races, which would represent in my judgment an extremely important departure in view of the fact that the test is now being used to determine eligibility of Negroes for employment.

Now, with respect to the Wonderlic Personnel Test—

Q Let me go back to the Beta so that we can clear that up for the record, too. You said that the information shows also a deviation in the fact that there were no Negroes in the more skilled or more highly paid job categories and there was, therefore, no determinations, or could be no

determinations of the job performances of Negroes, so in layman's terms would you be saying that you don't have any validation of Negroes of the Beta Test in this plant in the more skilled or highly paying lines of progression? A To my knowledge that is correct. To my knowledge there is no information developed at this plant about the validity of the Beta [for Negroes] in any jobs.

Q In any jobs. A Incidentally, I don't know that there were no Negroes included in the sample. I judge from the information given that if there were some there were very few, so in any event the accuracy of the test—the validity of the test for Negroes as a group was never established.

Q And I think that in your earlier testimony you said that the concurrent approach of validation had some serious effects, also? A Yes, it is less desirable, but it doesn't—it is an acceptable method, although less desirable, but I think particularly the deviation comes here from the fact that really nothing can be said about the validity of this test for Negro candidates for these skilled jobs, and we are not even sure that the jobs covered in the validation study were the critical ones that are at issue with respect to providing skilled employment opportunities for Negroes in this company since the jobs covered in the study are unspecified.

Q You were beginning to tell us some of the deviations in the company's institution of the Wonderlic Test. A Yes, sir. Again, in the case of the Wonderlic there was no systematic—no reference to any systematic job analysis as a basis for deciding that a test like the Wonderlic would be appropriate to use. Moreover, the Wonderlic—moreover, there was no validation study conducted of the Wonderlic

in this company according to Mr. Bryant's testimony. So, in this case we not only don't know whether the test was valid for Negroes, but we don't even know whether it was valid for whites for this class of jobs in this company.

Furthermore, the cut-offs that were adopted—the cut-off, I should say. Singular. The cut-off that was adopted for the Wonderlic Test was established as near as I can determine from the testimony on the basis of what was referred to as national norms, that is presumable. In the norms that are provided by the publisher of the Wonderlic Test, they do provide some kinds of suggested cut-off for different kinds of occupations. So, I assume some effort was made to judge from that information provided the cut-off that was most nearly maybe comparable to the jobs in question here, and to adopt that. That is a highly questionable procedure, not only in—for the general reasons that I have indicated in my earlier testimony, namely, that cut-offs should be determined empirically on the basis of experience in a given company, but that it is widely known that cut-offs, even if they are established for somewhat similar jobs, somewhere else in the country, are not necessarily applicable to a given situation in a given plant. There may be sufficient differences in the way the jobs are set up, the work requirements, and so on, to make the cut-off established in Company "X" inaccurate when applied to Company "Y."

As a matter of fact, in Exhibit 5 that's been submitted, on the second page of that exhibit—if I may quote from Mr. Wonderlic's own statement, referring to cut-off scores or what he calls "minimum scores" here, he says and I quote: "However, there have been minimum scores"—I'm sorry. If I may—if you would strike that. I mean to start earlier in my reference. Let me quote here: "What is needed, is to establish passing or so-called critical scores for

various occupations. This should be done for each company since job titles are not completely descriptive. They are known to vary from plant to plant even within the same organization. Also, the critical score—the passing score—must be moved up or down, depending upon the available supply of applicants."

Paragraph. "However, there have been minimum scores established in many industries which give some basis for the experimenter to check against."

Paragraph. "A skilled industrial psychologist will undoubtedly find variations from this table in studying any particular group and because of this, the author hesitates to furnish these norms." Period. End of quotation. Which is simply, again, a restatement of what I had already indicated, that it is widely recognized, and in my judgment even recognized by the statement of Mr. Wonderlic, that it is hazardous to adopt minimum scores or critical scores or cut-off scores from persons in other companies and other organizations and try to use that as a basis for setting passing scores in one's own company.

Q Did you find any additional deviations in the Wonderlic Test? A Well, of course, again, the central point —since no validation study was conducted, we have no evidence of whether the test operates in a discriminatory fashion for blacks in relation to whites.

Q Now, when you speak of no information on whether it operates in a discriminatory fashion, you are talking about whether its use at the Albemarle Paper plant operates in a discriminatory fashion? A That's correct.

Q Because there's been no test by the plant to determine —. A That's correct.

Q Did you have any additional deviations by the company in instituting the test that in effect violated the major principle of a local empirical study of the test. A In effect, many specifics were violated, but that general criticism of mine really is the core of it and there is no need to specify all of the details which therefore are overlooked there by this failure.

Q In short, then, there was, first of all, no information about a job analysis—the first point you mentioned? A Was necessary in order to determine the validity of a test, the suitability of a test, yes.

Q And the second point being, in the Wonderlic there was no validation at all? A Correct. Even in the Beta, where there was apparently a local validation, no separate analysis was made to whether the test worked in a valid and non-discriminatory fashion in relation—with Negroes in relation to whites.

* * *

[DEP. PP. 72-76]

Examination By Mr. Lowden:

* * *

Q (Mr. Lowden) Several times today you have mentioned that you worked for St. Regis Paper Company. Would you tell us in what capacity? A Yes. I served as a consultant to them in connection with my position as Director of the Psychological Services Center of Syracuse University. St. Regis Paper engaged us to assist them in setting up a selection test for factory operators in their bag division.

Q And when was this approximately? A Approximately 1950.

Q 1950. A '51—somewhere in there.

Q Did you set up some tests for St. Regis Paper Company? A Yes, we did.

Q What tests were they? A These were largely dexterity and performance tests.

Q You did not set up any intelligence tests? A No, not to my recollection, it did not include intelligence tests.

Q Do you recall the names of the tests you set up? A Some of them constructed by us, if I recall correctly, and others—I don't remember the names of them. I believe we used some of the Purdue University series. They have several manual and dexterity tests. And I believe some of those were included, but I must say I haven't checked my records on this recently and my memory isn't that good.

Q And the bag division at St. Regis Paper Company is located where? A Well, they have several plants. The two that we particularly studied were at Franklin, Virginia, and Pensacola, Florida.

Q Would you explain to us how you validated those tests? A Essentially, by the methods that I have described, that is, we did do job analysis of the positions in question. On this basis we inferred some of the coordination dexterity factors, mechanical factors, in doing the jobs. We did a concurrent validity study in the sense that we applied these tests to samples of current employees in those positions. We had the data on the effectiveness of the employees in performing these jobs and ran correlations between them and from those tests that were valid determined

some desirable ranges of scores for employing new applicants.

Q Did you validate it by races? A We did not, sir. To the best of my recollection these positions were occupied only by whites at that time.

Q So in 1950 at St. Regis you did the same thing that Albemarle Paper Company did several years later and did the best they could with what they had at the time—right?

Mr. Chambers: I object to that.

A Right.

* * *

Q (Mr. Lowden) All right. Well, if you—if there were no Negroes there today how would you validate it for the two groups? A The validation for Negroes would have to be done on one of these predictive strategy—the predictive strategy that I mentioned.

Q In other words, what you're saying to me, you think that the company should hire just a bunch of people and see how the test worked out and later—from there? A Well, I don't know what you mean by "just." If you would exclude that word, I'd say: yes, I think the company should hire—

Q Hire some Negroes and give them the tests and hire them anyway and see how the tests score? A Right. And in doing so, not ignore other kinds of information that might bear on the eligibility of the candidates for employment. As a matter of fact, if these were tests that, based on information from some roughly parallel situation, might be presumed possibly to have validity in this situation, I would not even be adverse to using a liberal cut-off even

with the test before they had been fully validated, and I have so advised clients, but the cut-off should be extremely liberal to avoid unfair exclusion of some people, many people who might be really qualified, and, also for technical reasons to provide enough range of test scores so one can check out and see what the proper cut-off score really should be.

* * *

[DEP. PP. 79-82]

Q Okay. Now, all afternoon, Doctor, you have been talking about ethnic groups. And it is my understanding that this belief that you have that some people don't do as well on tests as others is not limited to ethnic groups; there may be differences within each ethnic groups. And, really, what you're talking about is people who are culturally deprived—I believe the words are—rather than a specific race. In other words, there's white people, if they are culturally deprived, who don't do as well on these tests either? A That is correct.

* * *

Q So what you're doing is distinguishing between the culturally deprived people and those who have had the benefits of good up-bringing and schooling, and so forth, basically? A Well, I think we are saying two things. One is that we are referring to cultural disadvantage as the factor that may depress test performance, and not a man's skin color or his biology. But I think we are saying another thing as well: that in the United States, in most localities, that more Negroes are culturally deprived, and other ethnic minority as well—including Puerto Ricans, American Indians, and so on—that is true of whites as a matter of

proportion, and if one were to take a sample of Negroes in New York City—and, I dare say, Roanoke Rapids, North Carolina—a random sample of them, that one would find more of them culturally deprived than a random sample of whites.

Q But you would not know that unless you actually took a sample? A I wouldn't know that about a specific location.

Q You mean a specific location. And you would not know about the people who apply for employment at our mill unless you actually studied those people? A That is correct.

Q Let me see if you will agree with me. Will you agree that race, per se, will cause a differential on an intelligence test, that fact alone—race? A Would you read it, please?

(Question Read)

A I am not sure I understand the question, sir. You mean for a given individual?

Q For a given individual. A For a given individual? Now, may I ask you for your definition of "race"?

Q Let's say the color of the skin. A The color of the skin. For some individuals the answer might be: no, but for others it might be: yes. If you want me to explain that answer, it will take another one of those lectures that you objected to before.

Q The Negroes. A Clearly, you know I know the manifest point of your question, and I am not saying I am saying that the fact that a man's skin is black or white is not itself the immediate cause of his intelligence and, obviously, the answer—I would agree with that point. But causality is

a sequential thing very often and, therefore, it depends on what you mean by causality and so on.

Q Let's get—as far as I am concerned, if you want to make a ridiculous answer, I will be satisfied with it. A If you want one, I will be glad to give you a lecture, but that will probably take about a half an hour.

Q Now we have already had a psychology course. A I wonder if I could give you just one minute of my lecture.

Q Off the record or on? A It could be on. The point I wanted to make: that race can cause—can be a factor causing an individual's intelligence test score to be at a certain level insofar as he has been treated by society on the basis of his skin color, so that by a chain of indirect causations race may cause—may account for his intelligence performance.

* * *

[DEP. PP. 84-87]

Q And, then, still in 1950—I think it was 1954 or 1955—it would not be unreasonable for an employer to have reached the conclusion that the high school education doesn't work because some of the courses they teach in high school—I think your testimony in your case is baton twirling—to try to find a task that would disclose whether or not the high school diploma the man had meant something; that would not be an unreasonable thing to do, would it? A No.

Q It would particularly not be unreasonable if your personnel manager was a major psychological—one of his fields of study had been psychological testing. Would it not be normal to ask him to go into the matter and see if he

could come up with a test? A To see if he could come up with a test? Yes, it would be quite a normal thing.

Q If you had an employee who had a degree in psychology in all but one—I think had all of his courses completed but about one hour to a degree of PhD in psychology at Purdue University, would you not think he was reasonably capable of conducting a validation test study? A Yes, I would.

Q If—at that time would it not have been reasonable for that person, in making this judgment that you talk about, that you first make when you are looking for tests, wouldn't the Beta have presented itself as one of those that he might well have considered? A I don't think I can answer this because I don't know these jobs well enough.

Q Well, he was trying to—let me ask you this: don't you think that management has the right in its judgment to decide that we would like to have people in our organization to run our equipment who have approximately an average I.Q.? Isn't that a reasonable requirement, if you're going to put a man, say, on a seventy million dollar piece of equipment, in charge of it? A Again, I think it depends—you're asking me the—your question is based on the responsibilities of the job that I just have no first-hand knowledge of.

Q I'm asking you this: it is not beyond the realm of reasonableness to conclude I need a high school man? A That's right. Don't misunderstand me. I'm saying on a professional basis I can't say it is reasonable because I don't know the job. I can say it doesn't strike me as unreasonable. I can see how conceivably it is reasonable.

Q Wouldn't you say that management has a discretion, providing that they have no ulterior motive, why can't they

say: we want all high school graduates? It may be wrong from your point of view, but why can't they say—what is unreasonable about saying we need all people to be high school graduates? A It is unreasonable if it excludes from employment a segment of the population which might otherwise be qualified to do the job.

* * *

[DEP. PP. 90-95]

Q What would you say a score of 100 on a Beta test would represent? A You mean the I.Q. equivalent of 100.

Q And would that be about the average I.Q. for the country? A That is the average I.Q. for the country.

Q What is wrong—or I will put it a different way. What [is discriminatory if it is not job-relevant] by having a requirement that your employee have at least the average I.Q.? A In my judgment it is discriminatory [if it is not job related].

Q That is, about it not being related to the job. I want to know what is discriminatory in saying I want a person with average intelligence. Does that discriminate with that? Do you agree with this other gentleman whose article, I've got here, that was recently published? A Again, I would say that it is discriminatory if it excludes from the job people who could perform the job as well as those who have an I.Q. of a hundred.

Q Well, that is not answering my question.

* * *

Q (Mr. Lowden) I want to know, leaving aside whether or not it is a good predictor or good performance that you

keep talking about, I want to know why is the requirement or how can the requirement that you have an average intelligence of all the people in the United States, how that can discriminate against anybody, per se? What is discriminatory about that? A If you will forgive me, if I think for a moment, because I keep coming up with the same answer that I gave you before, which apparently didn't communicate to you, so I am trying to think of another way of saying it. Let me see if I can answer it in—first, in general terms. To me discrimination means barring an individual from employment on the basis of some value judgment that is not relevant to his job performance.

Q But supposing my bona fide belief is I need somebody of average intelligence, so—it is my business, so I make a decision that is what I want; I'm going to pay them? A That is your value judgment if you want intelligent people.

Q That's right, and I want to know what is discriminatory about it? A Again, I come back to the point it is discriminatory by my definition.

Q By your definition? A By my definition if it is on grounds that represent your personal preference, that is not relevant to the individual's actual capacity to do the job. To generalize, you know I might have a preference for incumbents, say who are men rather than women. This is my preference, but if a woman is qualified to do the job and I exclude her from it, then I think she's got a legitimate right.

Q So you're telling us that you think the Court in this case ought to determine for the management what kind of employees they need and tell us that we can't have people with high school educations; we can't have people with nor-

mal I.Q.'s. Isn't that the logical result of what you're saying? A No, sir, I don't believe so. I don't believe that I am arguing that Court or anyone else should tell you what kind of job performance is relevant to accomplishing the aims of your client's business. That I think is up to the client. But I think the Court—but I think I at least can counsel you that if you want this kind of job performance, then for crying out loud, don't exclude people who can give you that performance on irrelevant grounds.

* * *

Q So I am going to question you from the one that I happened to look at yesterday, which is the report to the Ford Foundation. In your Chapter I, Historical Perspective, in your report on Differential Selection Among Applicants from Different Socio-economic and Ethnic Backgrounds, on page 8, and talking whether or not there is a difference in test scores but performance on the job, you concluded it would seem that is something in the way of ideas, but little in the way of evidence regarding possible unfair discrimination in industrial selection. The purpose of the present research is to obtain and evaluate such evidence. Do you remember having used that language? A It sounds familiar.

Q So that in 1967 you said there was no evidence; there were a lot of ideas? A Little evidence.

Q Little evidence to support your theory that some people did poorly on tests but performed well, is that correct? A That wasn't our theory, incidentally, but to support the issue, you know, to eliminate the issue of whether in fact such possibility existed.

Q Now what evidence, other than your report of May, 1967, is there to support this thesis? There is very little in

1967, it said, and not much more— A That's right. Somewhat more, but still not a great deal. That is true.

* * *

[DEP. PP. 97-109]

Q You had a little problem, didn't you, because when Title VII was passed in 1964 one of the first things EEOC did was issue regulations that you could no longer designate the people in your employment file as being one race or another, so that they thought that the law—you couldn't do this, isn't that right? A That's right. There's been some revision of thinking subsequently on this, and it is now—

Q But the meaning of the law hasn't changed though, has it? A It is now my understanding, in part, as a result of findings like this—

Q You wrote them a note and said: you guys don't know what—what you're talking about, isn't that what you did? A I think so. We said in effect the intent of excluding ethnic groups from application was a good intent; it could backfire by not allowing ethnic considerations to enter into the proper interpretations of tests, and it is now—it is my understanding from the legal authorities in the United States Goverement that where ethnic considerations are to be known, are to be taken into account as a part of validation tests, to be sure that they are job relevant, but it is not illegal to acquire such evaluation.

* * *

Q So that would it be fair to conclude that in your opinion it would be—that as far as our mill at Roanoke Rapids is concerned, it would be better to keep on using the

tests we got rather than to abandon them altogether? A That conclusion doesn't follow from my previous statement.

Q Do you not think that the tests that we now have are more objective than if we turned the matter over to some personnel man to use his subjective instincts as to who is going to be a good employee or a bad employee? A Yes, they are more objective. They are not necessarily discriminatory.

Q What? They are not necessarily discriminatory at all? A Correct.

Q How many people do you think should be in a group in order to be an adequate sample to validate a test? A That—the answer to that is unfortunately, not as simple as one might like to have it, because it depends on several things. It depends, for example, on the variety of jobs that are going to be covered in the sample. If you have just one job, then the samples should be large enough to yield a statistically reliable result for the degree of validity that you will find practical and useful in your company. Now I can give you some illustrations of that.

Q Give us a range, from—five hundred or what? A I will give you a figure that might be sort of a ball park figure. Give me a moment for calculation here . . . I would —to give you—to answer your question, for a single job, a sample—ordinarily a sample of somewhere around 50 would be an adequate sample.

Q I believe in this study that you made for the Ford Foundation you were associated with Mr. Richard S. Barrett? A Correct.

Q Dr. Barrett—I guess I should say? A Yes.

Q And was Dr. Barrett sort of in charge of that? A He was the principal investigator on the study.

* * *

Q All right. He says, "A test that places no special obstacle in the path of Negro applicants cannot be said to be discriminatory." Do you agree with that? A "A test that places no special obstacle in the path of Negro applicants cannot be said to be discriminatory." Yes, if I understand the general—by "special" I presume he means—

Q It is right there. A Yes, I think I agree with the sense of that.

Q All right. If you agree with that, then will you please tell me, going back to my previous question, what special obstacle is put in the path of a Negro by asking him to have average intelligence? A As measured by a specific test?

Q Yes. A Because as soon as you qualify it with that, sir, you do place a special obstacle.

Q How? A Because the average Negro does not come up to the average white norm on which these tests are based.

Q Didn't you testify— A And the moot question is whether this is functionally related to his ability to perform on the job or whether that is—

Q That is your explanation? A Excuse me. Let me finish.

Q That is not the question I asked you. A Or whether it is—it is artifact of the test instrument which was used to determine his intelligence. If the test instrument were in fact equitable and non-discrimintaory, then it

would represent no special obstacle, but if the test instrument has in it a built-in barrier to Negroes achievements to the same scores as white, then it would be discriminatory.

Q Now we started out this morning, you and I, and started talking about the Beta Test. Are you telling us now that the United States Government in World War I was trying to devise a discriminatory test? They were trying to do exactly the opposite, weren't they; they were trying to devise a test to measure the intelligence of illiterate people? A Of illiterates, yes. Incidentally, it was not just a racial issue, because at the time of World War I there were many, many illiterates, including may whites, so it was not a racial issue.

Q So the Beta Test was a test to try to really be objective and non-discriminatory? A Right.

Q And you testified, I'm pretty sure, that there was a high correlation between the results of the Beta Test and the individual I.Q. test, such as the Otis? A The Otis is not an individual I.Q. test, by the way. It is an intelligence test.

Q So I'm asking—I will ask my question one more time. What special obstacle in the path of Negro employees is there in asking them to get an average I.Q. score on the Beta Test? What is discriminatory about that?

Mr. Chambers: May I ask for clarification of that question: are you talking about—what is discriminatory—for Roanoke Rapids to ask the residents of Halifax County to have an average I.Q.?

Mr. Lowden: I'm not asking—

Mr. Chambers: I just thought there ought to be some clarification of the question.

Mr. Lowden: I will clarify the question one more time.

Q (Mr. Lowden) He says he agrees with the statement —with his associate, Dr. Richard S. Barrett, and that statement is: "A test that places no special obstacle in the path of Negro applicants cannot be said to be discriminatory." There is then no civil rights issue involved; we have established that the Beta Test is not discriminatory—

Mr. Chambers: Wait a minute. We have not established that the Beta Test is not discriminatory.

Mr. Lowden: We have established that the Beta Test measures I.Q. It was established I think and agreed to, that the Government of the United States was trying to find a non-discriminatory objective test to give to illiterate people.

Q (Mr. Lowden) And my question is: tell me how the Beta Test is a special obstacle to Negroes? A I am not going to state for a fact, Mr. Lowden, that it is a special obstacle because I think that if you will recall the entire burden of my testimony has not been that we know that these procedures that you have been following are in fact irrefutably discriminatory. We have simply indicated that there is a reasonable foundation to that, that they may be discriminatory. Now, if you will bear with me on this—

Q I will bear with you to this extent: I think you have been very careful all afternoon, and I appreciate it and I think it is right, to say it may be, it could be: there is no evidence it might be but there is no evidence that it in fact is, and there is no evidence here that we in fact intend it to be—go ahead.

Mr. Chambers: That is your position. We don't know about the last statement, about whether it was intended to be. It is not shown in the record. That is your opinion of the evidence in the record.

Mr. Lowden: That is the evidence in the record.

A Now, with that context in relation to your present question, we know that I.Q. tests, intelligence tests like the Otis and Wonderlic, in the various majority of instances where comparable samples of Negroes and whites have been compared, tend to result in lower average scores for the Negroes than for the whites. While I don't know of such data specifically on the Beta for sure, I think there is this, but my memory is not that clear on this at the moment. The fact that the Beta correlates high with the Otis would certainly suggest the same thing would be true for the Beta. We know of instances where Negro samples scoring lower on the average than white samples in an employment situation in fact have not proven to be less satisfactory employees.

Q But that is not the point. A Excuse me. I am leading up to my point. So that, in a given situation, if all of these circumstances were true, then a larger proportion of Negroes taking the Beta for employment at your Roanoke Rapids plant might well get lower scores than is true of the white applicants for that plant, and in that event—again, understand, if all those circumstances were true, it would in fact be discriminatory against the Negroes. I say if those things are true. I don't know that they are true of your situation, as I have said before, but they might well be true, and there are many, many data that suggest there is a good probability that they might be true.

Q Let me ask you this: you have two people to come down to the employment office; one of them gets 95 on the Beta Test and he is Negro, and the other one gets 120 and he is white. Is is not discrimination against the white man to give the job to the man who gets a 95 I.Q.? Why

shouldn't that man have the job; he's got a higher I.Q. It's discrimination in reverse—what you're arguing for—is it not? A No, there is nothing in which I have said thus far that has argued for discrimination in reverse, because if your study would show that the Negro with a score of 95 can do the job as well as the white man with 120, then I would say there is no discrimination in reverse, in either direction.

Q Then why should the Negro get the job and the white man be turned down, if both of them can do the job and the white man has the higher I.Q.?

* * *

Q (Mr. Lowden) Well, you're talking about job performance and job related tests. I will go this far with you: one of the plaintiffs in this case was hired to drive a mule—years ago—I don't think he could read or write, but he was a mule driver. Now I suppose that if you and he both took the Beta Test, you would come out much better than he would, but I bet he would be the better mule driver—than you are? A I wouldn't be a bit surprised.

* * *

PLAINTIFFS' EXHIBIT NO. 69

Barrett, Richard S.

Born, 1924, Married, 3 Children

5 Riverview Place
Hastings-on-Hudson, N. Y. 10706
914 - 478-1302

Educational Background:

1948—B.S., Administrative Engineering, Cornell University

1951—M.A., Education, Syracuse University

1956—Ph.D., Industrial Psychology, Western Reserve University

Work History:

1969 to Date—Assistant Director for Educational Research, Center for Urban Education, New York. Direct research on education of urban children, primarily educationally deprived pupils in the elementary grades.

1968 to 1969—Senior Associate, Case and Company, Inc. Consultation in personnel and industrial psychology, education, fair employment practices.

1965 to 1967—Director, Materials Evaluation, Science Research Associates, Inc. Developed staff of applied educational research psychologists. Supervised investigations into computer assisted instruction, reading, mathematics and science programs, and a wide variety of studies in the education of typical and atypical students from kindergarten through junior college.

1965 to 1967—Research Associate Professor of Psychology, New York University. Principal Investigator "Differential Selection Among Applicants From Different Socio-Economic and Ethnic Backgrounds." This research has shown that employment tests do not necessarily have the same meaning for minority groups as for the groups for which they were developed.

1958 to 1965—Assistant to Associate Professor of Management Engineering and Psychology and Program Director, Research Center for Industrial Behavior, New York University. Supervised research on the significance of perceptions of job performance and job requirements and on the effectiveness of training. Consultant to several corporations.

1955 to 1958—Vice-President of Personnel Research and Development Corp., Cleveland, Ohio. Consulted with industry, conducted research in selection and performance rating.

Earlier Positions—Research Associate, Operations Research Group at Case Institute of Technology. Professional Associate, Richardson, Bellows, Henry & Co., New York. Industrial Engineer, Liberty Products Corp., Farmingdale, New York.

Professional Societies:

American Psychological Association
Member—1953 to Date
Education and Training Committee, Division 14
Chairman—1960-1961
Member—1960-1963

Eastern Psychological Association
Member—1957 to Date

Registration Chairman—1959-1960
Placement Chairman—1962-1963

American Educational Research Association
Member—1965 to Date

New York State Psychological Association
Member—1958 to Date
Board of Directors—1962-1963

Metropolitan New York Association for Applied Psychology
Member—1958-1965
President—1963-1965

Honorary Societies:

Phi Delta Kappa (Member)
Alpha Pi Mu (Member)

Certification:

Certified Psychologist, New York State, 1958-date

Diploma:

Diplomate in Industrial Psychology, American Board of Examiners in Professional Psychology, 1962

Community Activities:

Trustee, Board of Education, Dobbs Ferry, 1962-1965

Selected Publications:

with Taylor, E. K., Parker, J. W., and Martins, L. Rating Scale Content I. Scale Information and Supervisory Ratings. Personnel Psychology, 1958, 11, pp. 333-346.

with Taylor, E. K., Parker, J. W., and Martens, L. Rating Scale Content II, Personnel Psychology. 1958. 11, pp. 519-534.

with Parker, J. W., Taylor, E. K., and Martens, L. Rating Scale Content III. Relationship Between Supervisory- and Self-Ratings. Personnel Psychology. 1959, 12. pp. 49-64.

Survey of Human Engineering, Machine Design, January 24, 1957.

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with Goldberg, M., and Dawson, R. I., Comparison of Programmed and Conventional Instruction Methods. Journal of Applied Psychology, 1965, 48, pp. 110-114.

with Feinberg, M. R., Balinsky, B., Garber R., Ruch, F., and Steckel, L. Outside Consultants to Industry: Strengths, Problems, and Pitfalls (A Symposium). Comments on the Symposium. Personnel Psychology, 1964, 2, pp. 128-133.

with Heinneman, R. F. D. Human Engineering Considerations in the Evaluation of the Instructor's Console of OFT's. Report to Special Devices Center, 1953.

with Katzell, R. A., and Parker, T. C. Job Satisfaction, Job Performance and Situational Characteristics. Journal of Applied Psychology, 1961, 45, pp. 65-72.

The Process of Predicting Job Performance. Personnel Psychology, 1958, 11, pp. 39-57.

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Performance Suitability and Role Agreement: Two Factors Related to Job Satisfaction. Personnel Psychology, 1963 Winter, pp. 345-357.

Explorations in Job Satisfaction and Performance Rating, Personnel Administration. Sept.-Oct., 1964, 27, pp. 14-17.

The Impact of the Executive Program on the Participants. Journal of Industrial Psychology, 3, 1965, pp. 1-14.

Performance Rating. Chicago, Science Research Associates, 1966.

Problems de selection. Synopsis, March 1965, pp. 3-16.

Reviews in Buros, O. K. *Sixth Mental Measurements Yearbook*. Highland Park, Gryphon Press.

The Influence of Supervisor's Requirements on Ratings. Personnel Psychology, 1966 Winter, pp. 375-387.

Gray Areas in Black and White Testing, Harvard Business Review, January-February, 1968, pp. 92-95.

with Kirkpatrick, J. J., Ewen, R. B., and Katzell, R. A. *Testing and Fair Employment*. New York, New York University Press, 1968.

The Computer Mentality Phi Delta Kappan, April, 1968, pp. 431-435.

PLAINTIFFS' EXHIBIT NO. 70

List of Cases in Which Barrett Testified

Richard S. Barrett

Activity in Fair Employment Practice Cases
(April 1971)

Testimony, Depositions, or Affidavits

Colbert v. *H-K Corporation,* C.A. No. 11599 (N.D. Georgia, filed February 27, 1968) (Deposition) (Appealed)

Griggs v. *Duke Power Company,* 291 F. Supp. 243 (M.D. N.C. 1968), Rev'd No. 13,013 (4th Cir. January 9, 1970) (Won in the Supreme Court)

Hart v. *Buckeye Industries, Inc.,* C.A. No. 702 (S.D. Georgia, filed March 27, 1968)

U.S. v. *Frazer,* 297 F. Supp. 319 (M.D. Ala. 1968) (Won)

U.S. v. *H. K. Porter,* 59 Lab. Cas. Paragraph 9204 (M.D. Ala. 1968) (Appealed)

U.S. v. *Jacksonville Terminal,* Civil No. 68-239 Civil-J (April 16, 1970) (Appealed)

Chance v. *Board of Examiners,* (1970) (Affidavit)

Davis v. *Washington,* (1970) (Affidavit)

Allen v. *City of Mobile,* (1970) (Scheduled May 25, 1971)

Castro v. *Beecher,* (Mass. Civil Service Commission) (1970) (Scheduled April 26, 1971)

Griggs v. *Wilson Sinclair,* (Iowa Human Rights Commission) 1971

Consultation

Barnaba v. *Rohm-Haas,* C.A. No. 68-H-257 (S.D. Texas, filed March 22, 1968)

Schrichte v. *Eastern Airlines,* (sex discrimination) (1970)

Allen Bradley, (OFCC hearing) (1968)

U.S. v. *Metal Lathers Union,* (1969)

Harding, (N.Y. FEPC hearing) (1969)

Pettway v. *American Cast Iron Pipe Company,* (1970)

Williams v. *Diamond Shamrock Chemical Company,* (1971)

Douglas v. *Hampton,* (U.S. Civil Service) (1971)

New York Commission for Human Rights, (Hearing) (1969) (1971)

U.S. v. *Georgia Power Company,* (1971)

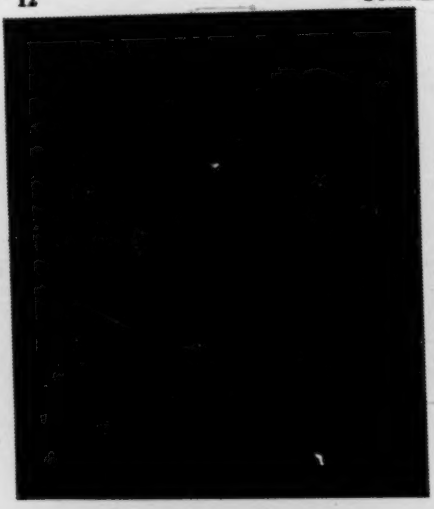
PLAINTIFFS' EXHIBIT NO. 71

Standards for Educational and Psychological Tests and Manuals

Prepared by a joint committee of the
American Psychological Association
American Educational Research Association
National Council on Measurement in Education

Cochairmen: JOHN W. FRENCH and WILLIAM B. MICHAEL

Published by the
AMERICAN PSYCHOLOGICAL ASSOCIATION, INC.
1200 Seventeenth Street, N.W. • Washington, D. C. 20036



C. Validity

Validity information indicates the degree to which the test is capable of achieving certain aims. Tests are used for several types of judgment, and for each type of judgment, a different type of investigation is required to establish validity. For purposes of describing the uses for three kinds of validity coefficients, we may distinguish three of the rather numerous aims of testing:

1. *The test user wishes to determine how an individual performs at present in a universe of situations that the test situation is claimed to represent.* For example, most achievement tests used in schools measure the student's performance on a sample of questions intended to represent a certain phase of educational achievement or certain educational objectives.

2. *The test user wishes to forecast an individual's future standing or to estimate an individual's present standing on some variable of particular significance that is different from the test.* For example, an academic aptitude test may forecast grades, or a brief adjustment inventory may estimate what the outcome would be of a careful psychological examination.

3. *The test user wishes to infer the degree to which the individual possesses some hypothetical trait or quality (construct) presumed to be reflected in the test performance.* For example, he wants to know whether the individual stands high on some proposed abstract trait such as "intelligence" or "creativity" that cannot be observed directly. This may be done to learn something about the individual, or it may be done to study the test itself, to study its relationship to other tests, or to develop psychological theory.

Different types of tests are often used for each of the different aims, but this is not always the case. There is much overlap in types of tests and in the purposes for which they are used. Thus, a vocabulary test might be used (*a*) simply as a measure of present vocabulary, the universe being all the words in the language, (*b*) as a screening device to discriminate present or potential schizophrenics from organics, or (*c*) as a means of making inferences about "intellectual capacity."

To determine how suitable a test is for each of these uses, it is necessary to gather the appropriate sort of validity information. The kind of information to be gathered depends on the aim or aims of testing rather than on the type of test. The three aspects of validity corresponding to the three aims of testing may be named content validity, criterion-related validity, and construct validity.

Content validity is demonstrated by showing how well the content of the test samples the class situations or subject matter about which conclusions are to be drawn. Content validity is especially important for achievement and proficiency measures and for measures of adjustment or social behavior based on observation in selected situations. The manual should justify the claim that the test content represents the assumed universe of tasks, conditions, or processes. A useful way of looking at this universe of tasks or items is to consider it to comprise a *definition* of the achievement to be measured by the test. In the case of an educational achievement test, the content of

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the test may be regarded as a definition of (or a sampling from a population of) one or more educational objectives. The aptitudes, skills, and knowledges required of the student for successful test performance must be precisely the types of aptitudes, skills, and knowledges that the school wishes to develop in the students and to evaluate in terms of test scores. Thus evaluating the content validity of a test for a particular purpose is the same as subjectively recognizing the adequacy of a definition. This process is actually quite similar to the subjective evaluation of the criterion itself. Unless, however, the aim of an achievement test is specifically to forecast or substitute for some criterion, its correlation with a criterion is *not* a useful evaluation of the test.

Criterion-related validity is demonstrated by comparing the test scores with one or more external variables considered to provide a direct measure of the characteristic or behavior in question. This comparison may take the form of an expectancy table or, most commonly, a correlation relating the test score to a criterion measure. Predictive uses of tests include long-range forecasts of one or more measures of academic achievement, prediction of vocational success, and prediction of reaction to therapy. For such predictive uses the criterion data are collected concurrently with the test; for example, when one wishes to know whether a testing procedure can take the place of more elaborate procedures for diagnosing personality disorders. A test that is related to one or more concurrent criteria will not necessarily predict status on the same criterion at some later date. Whether the criterion data should be collected concurrently with the testing or at a later time depends on whether the test is recommended for prediction or for assessment of present status.

Construct validity is evaluated by investigating what qualities a test measures, that is, by determining the degree to which certain explanatory concepts or constructs account for performance on the test. To examine contruct validity requires a combination of logical and empirical attack. Essentially, studies of construct validity check on the theory underlying the test. The procedure involves three steps. First, the investigator inquires: From this theory, what hypotheses may we make regarding the behavior of persons with high and low scores? Second, he gathers data to test these hypotheses. Third, in light of the evidence, he makes an inference as to whether the theory is adequate to explain the data collected. If the theory fails to account for the data, he should revise the test interpretation, reformulate the theory, or reject the theory altogether. Fresh evidence would be required to demonstrate construct validity for the revised interpretation.

A simple procedure for investigating what a test measures is to correlate it with other tests. We would expect a valid test of numerical reasoning, for example, to correlate more highly with other numerical tests than with clerical perception tests. Another procedure is experimental. If it is hypothesized, for example, that form perception on a certain projective test indicates probable ability to function well under emotional stress, this inference may be checked by placing individuals in an experimental situation producing emotional stress and observing whether their behavior corresponds to the hypothesis.

Construct validity is ordinarily studied when the tester wishes to increase his understanding of the psychological qualities being measured by the test. A validity coefficient relating test to criterion, unless it is established in the context of some theory, yields no information about *why* the correlation is high or low, or about how one might improve the measurement. Construct validity is relevant when the tester accepts no existing measure as a definitive criterion of the quality with which he is concerned (e.g., in measuring a postulated drive such as need for achievement), or when a test will be used in so many diverse decisions that no single criterion applies (e.g., in identify-

ing the ability of Peace Corps trainees to adapt to new cultures). Here the traits or qualities underlying test performance are of central importance. It must be remembered, however, that, without a study of criterion-related validity, a test developed for diagnosis or prediction can be regarded only as experimental.

These three aspects of validity are only conceptually independent, and only rarely is just one of them important in a particular situation. A complete study of a test would normally involve information about all types of validity. A first step in the preparation of a predictive *(criterion-related)* instrument may be to consider what *constructs* are likely to provide a basis for selecting or devising an effective test. Sampling from a *content* universe may also be an early step in producing a test whose use for *prediction* is the ultimate concern. Even after satisfactory *prediction* has been established, information regarding *construct* validity may make the test more useful; it may, for example, provide a basis for identifying situations other than the validating situation where the test is appropriate as a predictor. To analyze *construct* validity, all the knowledge regarding validity would be brought to bear.

The three concepts of validity are pertinent to all kinds of tests. It is the intended use of the test rather than its nature that determines what kind of evidence is required.

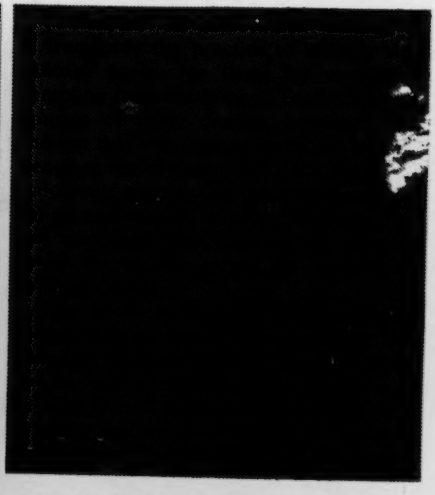
Intelligence or scholastic aptitude tests most often use criterion-related validity to show how well they are able to predict academic success in school or college, but the nature of the aptitudes measured is often judged from the content of the items, and the place of the aptitude within the array of human abilities is deduced from correlations with other tests.

For achievement tests, content validity is usually of first importance. For example, a testing agency has a group of subject-matter specialists devise and select test items that they judge to cover the topics and mental processes relevant to the field represented by the test. Similarly, a teacher judges whether the final test in his course covers the kinds of situations about which he has been trying to teach his students certain principles or understandings. The teacher also judges content when he uses a published test, but he can appropriately investigate criterion-related validity by correlating this test with tests he has prepared or with other direct measures of his chief instructional objectives. When the same published achievement test is used for admissions testing, it may reasonably be checked against a later criterion of performance. In any theoretical discussion of what is being measured by the achievement test, a consideration of construct validity is required. Whether the score on a science achievement test, for example, reflects reading ability to a significant degree, and whether it measures understanding of scientific method rather than mere recall of facts are both questions about construct validity.

Development of a personality inventory will usually start with the assembly of items covering content the developer considers meaningful. Such inventories are then likely to be interpreted with the aid of theory; any such interpretation calls for evidence of construct validity. In addition, a personality inventory must have criterion-related validity, if, for example, it is to be used in screening military recruits who may be maladjusted.

Interest measures are usually intended to predict vocational or educational criteria, but many of them are also characterized by logical content and constructs. This makes it more likely that they can provide at least a rough prediction for the very many occupations and activities that exist and for which specific evidence of criterion-related validity has not been obtained.

For projective techniques, construct validity is the most important, although criterion-related validity using criteria collected either concurrently with the testing or afterwards may be pertinent if the instruments are to be used in making diagnostic classifications.



Criterion-Related Validity

C4. All measures of criteria should be described completely and accurately. The manual should comment on the adequacy of the criterion. Whenever feasible, it should draw attention to significant aspects of performance that the criterion measure does not reflect and to irrelevant factors that are likely to affect it. ESSENTIAL

[Comment: Desirable practices are illustrated in a manual for a test designed to measure abstract intelligence. Several validity studies relating this instrument to criteria are reported, some involving concurrent measures and others involving predictions over periods of time. Limitations of the studies are recognized and it is stated that "no one criterion is uniquely appropriate." The value of local norms is stressed and an example of a local expectancy table is provided.

In the case of interest measures, it is sometimes not made clear whether the criterion indicates satisfaction, success, or merely continuance in the activity under examination. When criterion groups include men in a given occupation and when a comparison of such groups is made to men-in-general, the manual should point out the distinction between

presence in an occupation and success in it or satisfaction with it.]

C4.1. The manual should report the validity of the test for each criterion about which a recommendation is made. If validity for some recommended interpretation has not been tested, that fact should be made clear. ESSENTIAL

C4.2. For any type of prediction the manual should report test-criterion correlations for a variety of institutions or situations. Where validity studies have been confined to a limited range of situations, the manual should remind the reader of the risks involved in generalizing to other types of situations. ESSENTIAL

[Comment: One manual for an aptitude battery presents a great variety of test-criterion correlations. It states that even though the large amount of test-criterion data presented may be confusing to the user, it is nevertheless necessary since "validity is specific" and must always be interpreted for a particular setting in which "the test user himself must evaluate and integrate all of the data available to him."]

C4.3. Since the criterion measure is a sample of possible criterion data, the agreement of that sample with other similar samples that might have been used as measures of the criterion should be reported. If evidence on this question cannot be given, the author should make this clear and should discuss the probable extent of agreement of the sample with other samples as judged from indirect evidence. VERY DESIRABLE

[Comment: When validity is measured by agreement of the test with psychiatric judgment, for example, the degree of agreement among judges should be described. Where a published achievement test is used to obtain the criterion measures, the form-to-form agreement or the reliability reported by the test's author may be used as a basis for evaluating the criterion, due regard being given to the effect of differences between the present sample of persons and the original sample.]

C4.31. If validity coefficients are corrected for errors of measurement *in the criterion*, the computation of the reliability coefficient of the criterion should be explained, and both corrected and uncorrected coefficients should be reported in the manual. ESSENTIAL

[Comment: Coefficients corrected for errors of measurement in the *test* are not estimates of the criterion validity of the existing test and should not be reported. Corrections for attenuation are very much open to misinterpretation, and if misinterpreted give an unjustifiably favorable picture of the validity of the test. The hazard is illustrated in the manual for an adjustment inventory. The author reports correlations between inventory scores and criterion ratings, and also reports the estimated correlations between "true" inventory and criterion scores. He then comments that the augmented correlations "are as high as those often secured between college aptitude tests and college grades." The comparison is improper, since the test author is comparing his augmented coefficients with uncorrected coefficients for ability tests.]

C4.32. For users who are technically oriented, breakdown of test variance into the following sources is appropriate: variance relevant to the criterion, variance explained as form-to-form or trial-to-trial inconsistency, and a reliable-irrelevant remainder. VERY DESIRABLE

[Comment: Such a breakdown is far less subject to misinterpretation than a "corrected" validity coefficient.]

C4.4. The time elapsing between the test administration and the collection of criterion data should be reported in the manual. If the criterion data are collected over a period of time, beginning and ending data should be included. ESSENTIAL

C4.41. If a test is recommended for long-term predictions, but comparisons with concurrent criteria only are pre-

sented, the manual should emphasize that the validity of predictions is undetermined. ESSENTIAL

C4.5. The criterion score should be determined independently of test scores. The manual should describe any precautions taken to avoid contamination of the criterion or should warn the reader of possible contamination. ESSENTIAL

[Comment: When the criterion depends on a judgment, the manual should state whether the test data were available to the rater or were capable of influencing his judgment in any other way. If the test data could have influenced the criterion rating, the user should be warned that the reported validities are likely to be spuriously high.]

C4.6. When the validity of a test is appraised by its agreement with psychiatric diagnoses, the diagnostic terms or categories should be defined specifically and clearly described. VERY DESIRABLE

[Comment: For example, "paranoid schizophrenia, chronic" is preferable as a category to "schizophrenia." Since the types of patients included in specific diagnostic classifications depend to some extent on the point of view of the classifying psychiatrist, an amplified description of each diagnostic category used in the validity study should be presented.]

C4.61. When the validity of a test is appraised by its agreement with psychiatric judgment, the training, experience, and professional status of the psychologist(s) or psychiatrist(s) should be stated, and the nature and extent of his contacts with the patients should be reported. VERY DESIRABLE

C4.7. When the validity of a test for predicting occupational performance is reported, the manual should describe the duties of the workers as well as give their job titles. VERY DESIRABLE (See Comment C5.2.)

C4.71. Where a wide range of duties is subsumed under a given occupational label, the test user should be warned against assuming that only one pattern of interests or abilities is compatible with the occupation. VERY DESIRABLE

[Comment: The manual for one interest inventory rightly points out that, "for any given interest pattern, or combination of patterns, there are jobs at many levels for individuals with a wide range of abilities."]

C4.72. The amount and kind of any schooling or job training received by the subjects between the time of testing and the time of criterion collection should be stated. VERY DESIRABLE

C4.8. When the validity of a test for predicting grades in a course is reported, the reader of the manual should be given a reasonably clear understanding regarding the types of performance required in the course, the nature of instructional method, and the way in which performance is measured. If the test was administered after the course was started, this fact should be specified. ESSENTIAL

C4.9. Local collection of evidence on criterion-related validity is frequently more useful than published data. In such cases the manual should suggest appropriate emphasis on local validity studies, giving advice on how to conduct the studies and how to set up usable expectancy tables or other means for interpreting the results of the studies. VERY DESIRABLE

[Comment: In cases where criteria differ from one locality to another or from one institution to another, no published validity data can serve all localities. For example, the validity of a certain test for predicting grades at a college with a unique kind of curriculum may be quite different from the published validity of the same test that was based on more conventional colleges.]

Criterion-Related Validity Sample

C5. The sample employed in a validity study and the conditions under which

testing is done should be consistent with the recommendations made in the manual. They should be described sufficiently for the user to judge whether the reported validity is pertinent to his situation. ESSENTIAL

[Comment: In his effort to provide adequate data on the sample and on the testing conditions, the publisher is often faced with a dilemma. Too much detailed information in a manual may reduce its effectiveness; yet insufficient data do not allow for proper judgments by the competent user. One aptitude test publisher meets this problem by reporting only major findings, indicating that "detailed data are available from the American Documentation Institute."]

C5.1. Basic statistics that should be reported in the manual for the validation sample are measures of central tendency and variability. ESSENTIAL

C5.11. If the test scores that are analyzed have a distribution markedly different from the distribution of the group with whom the test is ordinarily to be used, correlations or other measures of discrimination in the group to whom the test is likely to be given should be estimated. In reporting such estimates, the manual should cite the original coefficient, the distribution characteristics used in making the new estimate, and the statistical procedure. ESSENTIAL

[Comment: An estimate larger than the observed validity coefficient may be needed when the observed coefficient is based on a group of employees or students who have been selected in such a way as to restrict the range of scores on the test. On the other hand, an estimate lower than the observed coefficient will be appropriate for the biserial correlation between a scholastic aptitude test and college success, where the persons distinguished are dropouts (lower end of the continuum) and honor students (upper end of the continuum). As the test will normally be applied to the whole group of entering students, the validity coefficient should reflect the somewhat lower predictive power of the test in that group.]

C5.2. The validity sample should be described in the manual in terms of those variables known to be related to the quality tested, such as age, sex, socioeconomic status, and level of education. Any selective factor determining the composition of the sample should be indicated. ESSENTIAL

[Comment: If a validity study uses patients as subjects, the diagnoses of the patients would usually be important to report. The severity of the diagnosed condition should be stated when feasible. For tests used in industry the occupation and experience of the workers should be described. For educational tests the nature of the community and any selection policy of the school should be reported.]

C5.3. If the validity sample is made up of records accumulated haphazardly or voluntarily submitted by test users, this fact should be stated in the manual, and the test user should be warned that the group is not a systematic or random sample of any specifiable population. Probable selective factors and their presumed influence on test variables should be stated. ESSENTIAL

[Comment: While it is entirely appropriate to include in the manual such phrases as "the author and publisher of this test would welcome additional data derived from its use," it is extremely difficult to judge adequately the quality and representativeness of most of the resulting reports.]

C5.4. The validity of a test should be determined on subjects who are at the age or in the same educational or vocational situation as the persons for whom the test is recommended in practice. Any deviation from this requirement should be described in the manual. ESSENTIAL

[Comment: The validity of tests intended for guidance should generally be determined on subjects tested prior to or

near the time when they are making educational or vocational choices.

One interest inventory was standardized at first on men currently employed in the occupation in question. The ability of these scales to differentiate between occupational groups did not, in and of itself, warrant using the inventory in the counseling of high school or college students. Better evidence was obtained later by administering the inventory to students, determining the nature of their later employment, and then establishing the relation between preoccupational score and later occupation.

If an interest inventory uses a criterion of enrollment or nonenrollment in a certain occupation, the sample used in its validation should include only the range of mental ability appropriate to the occupational group. For example, college students are not suitable subjects with which to estimate the validity of a scale of interest in manual skills, even though some of them later enter manual occupations.]

C5.41. If an ability test is to be used for educational or occupational selection, its validity should be established using subjects who are actual candidates and who are therefore motivated to perform well. If the subjects used in a validity study did not believe that their test scores would be used in making decisions about them, this fact should be made clear. VERY DESIRABLE

C5.5. If the validity of the test is likely to be different for subsamples that can be identified when the test is given, the manual should report the results for each subsample separately or should report that no differences were found. VERY DESIRABLE

[Comment: It is often useful to perform validity studies separately on samples differing in one or more of the common demographic variables. Since subsamples are likely to differ in range, statistical corrections may be necessary to make the results comparable. In such cases a regression equation may be more informative than a correlation coefficient.]

C5.6. In collecting data for a validity study, the person who administers, scores, or interprets the test should have only that information about the examinees that is ordinarily expected to be available in practical use of the test. If there is any possible contamination associated with prior favorable or unfavorable knowledge about the examinees, the manual should discuss its effect on the outcome of the study. ESSENTIAL

[Comment: Whenever knowledge about the examinee may influence test administration or scoring, as it might in the case of individual intelligence tests or projective techniques, the test administrator should not possess knowledge about the examinees that might bias his interpretation of the examinee's responses. Knowing that an examinee is regarded as maladjusted but able may make the person administering an individual test more prone to explore borderline answers or to encourage the examinee when he encounters difficulty. Data collected under such circumstances do not provide an adequate basis for judging the validity of the test by itself.]

Criterion-Related Validity Analysis

C6. Any statistical analysis of criterion-related validity should be reported in the manual in a form from which the reader can determine what confidence is to be placed in judgments or predictions regarding the individual. ESSENTIAL

C6.1 Statistical procedures that are well known and readily interpreted should be preferred in the manual for reporting validity. Any uncommon statistical techniques should be explained, and references to descriptions of them should be given. ESSENTIAL

[Comment: Publishers need not adhere to the commonly used procedures for reporting validity data, but there should be sufficient standard terminology and procedures to allow for adequate judgment by reasonably competent users. One

recently developed ability test manual introduces "circular" profiles, "range" and "stability" scores, and other novel statistical procedures so inadequately explained as to give an aura of the bizarre to the entire manual.]

C6.11. A report in the manual or elsewhere concerning the criterion-related validity of tests should ordinarily include: (*a*) one or more correlation coefficients of a familiar type, (*b*) descriptions of the efficiency with which the test separates criterion groups, (*c*) expectancy tables, or (*d*) charts that graphically illustrate the relationship between test and criterion. ESSENTIAL

[Comment: Reports of differences between group means by themselves give inadequate information regarding validity. If variance is large, classification may be inaccurate even if means differ significantly. A description indicating amount of misclassification or overlapping should be included. The emphasis should be on descriptive statistics for individuals; a significance test alone is insufficient.

In general, since manuals are directed to readers who have limited statistical knowledge, every effort should be made to communicate validity information clearly. For instance, a certain manual reports no criterion-related validity data collected over a period of time; yet the case studies presented suggest a degree of validity totally unsupported by the data in the manual.]

C6.12. If a test is suggested for the differential diagnosis of patients, the manual should include evidence of the test's ability to place individuals in diagnostic groups rather than merely to separate diagnosed abnormal cases from the normal population. ESSENTIAL

[Comment: When a test is recommended for the purpose of assigning patients to discrete categories, such statistics as contingency coefficients, phi coefficients, or discriminant functions should be supplemented by a table of misclassification rates giving, for example, the proportion of patients falsely included in a category or falsely excluded from it. Such proportions should be compared with base rates, i.e., the proportions of correct classifications made possible by a mere knowledge of the sizes of the categories.]

C6.2. An overall validity coefficient should be supplemented with a report regarding the regression slope and intercept and the standard error of estimate at different points along the score range. VERY DESIRABLE

[Comment: The required information could be presented in an expectancy table showing the range of possible criterion values for each of several points on the score range.

For a dichotomous criterion, this objective might be achieved by indicating the proportion of hits, misses, and false inclusions at various cutting scores. One reading readiness test, for instance, reports the percentage of failure in primary reading expected among pupils at each level of test score.]

C6.3. When information other than the test scores is known to have an appreciable degree of criterion-related validity and is ordinarily available to the prospective test user, the manual should report the validity of the other information and the resulting multiple correlation when the new test information is combined with it. ESSENTIAL

[Comment: Whether a test should be used for prediction and classification when other information is readily available depends not on the validity of the test but on its "incremental validity," i.e., what it adds to the soundness of the judgment that would otherwise be made.

For a test recommended as a predictor of school achievement, the manual should report how much the test enhances prediction based on the subjects' previous school records. A test is not likely to improve greatly the prediction of college grades when it is highly correlated with past high school grades. Such a test may

be used in dealing with pupils coming from scattered high schools, the past records of which are not available or not on a comparable scale, or it may be used to correct statistically the records for different schools to make them comparable.

For a questionnaire intended to predict marital success, delinquency, and similar behavioral variables, the manual should report how much the questionnaire enhances prediction over that provided by base rates developed from demographic variables such as socioeconomic status.]

C6.31. If the validity of a test is demonstrated by comparing groups that differ on the criterion, the manual should report whether and by how much the groups differ on other available variables that are relevant. VERY DESIRABLE

[Comment: Since groups which differ on a criterion may also differ in other respects, the test may be discriminating on a quality other than that intended. Types of mental disorder, for instance, are associated with age, education, and length of time in hospital. Confounding of this sort should be taken into account when appraising the usefulness of the test for diagnosis.]

C6.4. When a scoring key or the selection of items is based on a tryout sample, the manual should report validity coefficients based on one or more separate cross-validation samples, rather than on the tryout sample or on a larger group of which the tryout sample is a part. ESSENTIAL

C6.5. If the manual recommends certain regression weights for combining scores on the test or for combining the test with other variables, the validity of the composite should be based on a cross-validation sample. VERY DESIRABLE

[Comment: Cross-validation is particularly necessary when the number of predictors entering the study (not the final equation) is greater than four or five and when the sample size is less than 200.]

C6.6. Whenever it is proposed that decisions be based on a complex nonlinear combination of scores, it should be shown that this combination has greater validity than some simpler linear combination. VERY DESIRABLE

[Comment: The use of "moderator variables," for example, is to be recommended only where this produces a clear improvement in validity in a cross-validation sample. Also, when it is proposed that some pattern of scores, for example, high standing in scores on both Variables 2 and 5, is an indicator of success, it is necessary to show that the proportion of successful persons in the group so identified is higher than would be expected from the regression of frequency of success on a linear combination of Scores 2 and 5.]

C6.7. To ensure the continued correct interpretation of scores, the validity of the suggested interpretations should be rechecked periodically and the results reported in subsequent editions of the manual. VERY DESIRABLE

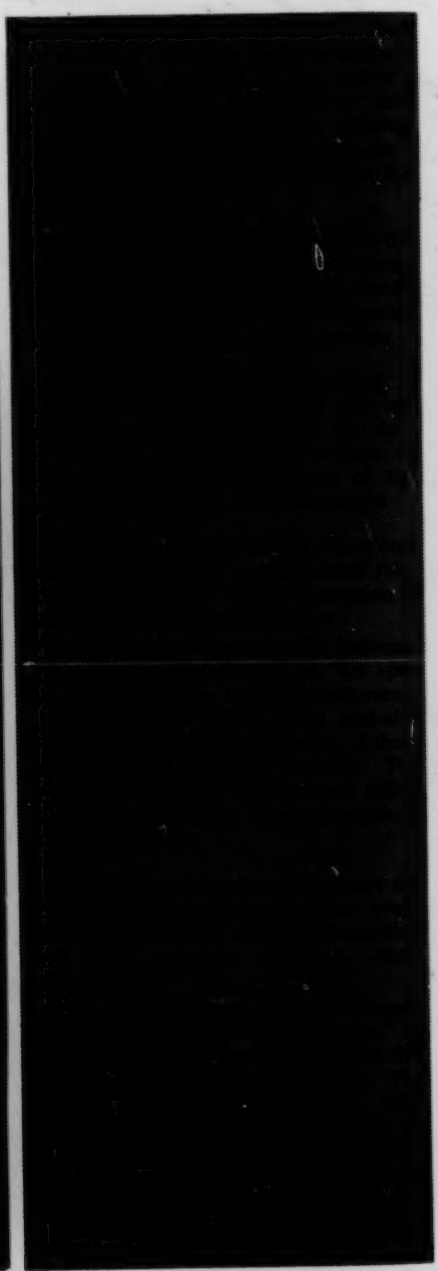
[Comment: Job requirements, conditions of work, and the types of person entering an occupation often change materially with the passage of time. Similarly the meanings of clinical categories, the nature of therapeutic treatment, and the objectives in any school course change. So also will the difficulty and psychological meaning of test items. Hence, the reader should be in a position to judge the extent to which scales are obsolete.

Criterion data for the psychologist scale of a much used interest test were gathered in 1927. Subsequent research showed that these psychologists were no longer representative of the field. The current manual reports the date (1948) of the validating studies for the revised key. With the growth of mathematical psychology on the one hand, and of private clinical practice on the other, this scale may, in certain aspects, again be obsolescent.]

C6.71. If the validity of a suggested test interpretation has not been checked within 15 or 20 years, the test should be withdrawn from general sale and dis-

tributed, if at all, only to persons who will conduct their own validity studies. DESIRABLE (See A2.)

[Comment: This standard, as worded, is extremely liberal. Removal of tests from the market and repetition of validity studies have not been common practice. The present liberal standard moves only a short way toward the ideal. It is not necessary to repeat every part of the validation; what is needed is a repetition of those studies that are most likely to have been rendered obsolete.]



POOR COPY

DEFENDANT ALBEMARLE'S EXHIBIT NO. 2

Power Plant

List of Items Submitted

1. Instructions for safe handling of chemicals
2. Nalco Operating Handbook
3. Cochrane Manual, Sections 1-5
4. Water Plant Log Sheet
5. Water Log Sheet
6. Layout of Water Plant and notes of clarifier operation
7. Layout of Power Plant flow systems
8. Combustion Engineering Handbook
9. General Electric Handbook
10. Written operating instructions
11. Turbine Log Sheet
12. Instrument flow diagrams
13. Bailey Meter Company Handbook
14. Set of Power Plant charts
15. Power Plant Log Book
16. Boiler Log Sheet
17. Bark Log Sheet

Wood Yard
Content Evidence:

1. Record by tractor driver placing cars to be unloaded which is given to Foreman at end of shift. (Picture of chain operator's panel).

2. Chip unloader receiving and unloading report.
3. Wood Yard Oiler Lubrication Chart.
4. Small Equipment Operator's Manual for D-8 Bull-dozer.
5. Small Equipment Operator's Lubrication Chart for Michigan Tractor Shovel (Front end loader).
6. Long Log Operator's daily report.
(Picture Long Log Operator's control panel).
7. Operator's Manual—lima, shovel, crane, clam shell, drag-line and pull shovel—Type 802.
8. Crane Operator's Check Report.
9. American Crane Operator's Instruction Manual on control adjustments.

Pulp Mill
Content Evidence:

1. Standard Operating Procedure No. 6 Recv. Boiler—on line procedure when No. 1 Power Boiler is up to pressure.
2. Standard Operating Procedure—Green Liquor Line Wash out.
3. Standard Operating Procedure—Boiler Blow-down Valves.
4. Standard Operating Procedure—No. 6 Recv. Stream Press Control System report from C. Reese.
5. Standard Operating Procedure Recv. Boiler Spray Liquor Solids.
6. Standard Operating Procedure—Green Liquor Test.

7. Standard Operating Procedure—Salt Cake Inventory Control.
8. Memo from Hank: Recv. 1st helper No. 5 Recv. Boiler.
9. Memo from Hank: Recv. 2nd Helper.
10. Screening—Washing Reports: 5-3-71, 5-9-71, 5-12-71, 5-13-71, 3-8-71, 4-22-71, 5-19-71, 5-29-71.
11. Memo from Hank—Caustic Operator and reports.
12. Memo from Hank—Kiln Operator and reports.
13. Recv. operational check sheet.
14. Memo from Hank—qualification of Recv. Operator.
15. No. 5 Recv. Reports.
16. No. 6 Recv. Hot Process Sgtner Raw water-label flow.
17. Sgtner Rejuvenation Cycle—Blue Pen—back water flow.
18. No. 3 Water Sgtner chart X10=GPM.
19. No. 2 Water Sgtner chart X10=GPM.
20. No. 4 Water Sgtner chart X10=GPM.
21. No. 1 Water Sgtner chart X10=GPM.
22. No. 5 Recovery—Prec. level and dis. Density Black liq. To solids. Red-Precipitator level—blue-lower cascade density—Green black liquor solids 45-75%.
23. No. 5 Recv. air, gas, temp.
24. No. 5 Rev. Red: Black liq. flow to sprays 0-100,000 lbs.-hr. blue: up take draft 0-10 ins.
25. No. 5 Recv. Primary heater.
26. No. 5 Recv. Diss. tank level.
27. No. 5 Recv. Secondary heater.

28. No. 5 Cascade level.
29. No. 5 Recv. Green liq. Be.
30. B Evaporators—conductivity.
31. B Evaporators—feed liq. tank level.
32. No. 5 Recv. Sweet flow to feed tank.
33. B Evaporators ratio flow.
34. Evaporators Boiling Point first section.
35. No. 6 Recv. conductivity.
36. No. 6 Recv. liquor density.
37. No. 6 Recv. black liq. heater temp.
38. No. 6 Lower cascade level.
39. No. 6 Precipitator wet bottom level.
40. No. 6 Recv. Prec. valve Pos. No. 1, No. 2, No. 3.
41. No. 6 Recv. Oxygen and combustibles.
42. No. 6 Recv. heavy black liquor air flow.
43. Wash water valve position.

Maintenance
Content Evidence:

1. Assorted Training and operational manual for equipment maintenance employees must repair.
2. Assorted blue prints.
3. Outline of the apprenticeship Training Program.

Shipping B Mill
Content Evidence:

Instruction Manual for B Paper Mill Crew.
Assorted Blue Prints.

DEFENDANT ALBEMARLE'S EXHIBIT NO. 3

To: Edward C. Moore, Jr.
Albemarle Paper Company

From: Joseph Tiffin, Ph.D.

Re: Determination of relationships between test scores and rated job performance of employees on ten groups of jobs. All of the employees had been given the Beta Test, the Wonderlic Form A, and the Wonderlic Form B test.

General Summary: *Statistical Analysis*

Significant correlations were obtained for at least one of the three tests investigated for nine of the ten groups of jobs. A summary of these correlations is given in the following table. In this table asterisks are used to indicate the significance level of the correlations. Two asterisks (**) indicate that there is only one chance in 100 that the correlation could have occurred by chance. One asterisk (*) means that there are five chances in 100 that the correlation could have occurred by chance alone.

It is standard practice in the profession not to use tests if an analysis such as the one conducted in this investigation shows that there are more than five chances in 100 that the correlation could have occurred by chance alone.

Keeping this stipulation in mind, it can be seen in the following table that usable results were obtained with one or more of the tests for Job Groups 1, 2, 3, 4, 5, 7, 8, 9, & 10, which is nine of the ten groups of jobs studied. The only job group for which none of the tests was found to be usable was Job Group 6 Stock Room Operator and Stock Room 1st Helper.

Job Group	*N*	*Beta*	*Test W-A*	*W-B*
1. Caustic Operator, Lime Kiln Operator	8	.25	1.00**	.47
2. C. E. Recovery Operator, C. E. Recovery 1st Helpers & Evaporator Operators	12	.64**	.32	.17
3. Wood Yard: Long Log Operators, Log Stackers, Small Equipment Operators & Oilers	14	.00	1.00**	.72*
4. Technical Services: B Mill Shift Testmen, Additive men, General Lab. Testmen, General Lab. asst., A Mill Testmen, Samplemen		.50*	.75**	.64*
5. B Paper Mill: Machine Tenders and Back Tenders	16	.00	.50**	.34
6. B Paper Mill: Stock Room Operator, Stock Room 1st Helper	8	—.50	.00	.00
7. B Paper Mill: 3rd Hands, 4th Hands & 5th Hands	21	.43	.81**	.60**
8. Wood Yard: Chipper Unloader, Chipper Operator, No. 2 Chain Operator	6	.76*	—.25	1.00**
9. Pulp Mill: Stock Room Operator, Stock Room 1st Helpers	8	.50	.80*	.76*
10. Power Plant: Power Plant Operator, Power Plant 1st Helper, Power Plant 2nd Helper	12	.34	.75**	.66*

Graphic Analysis

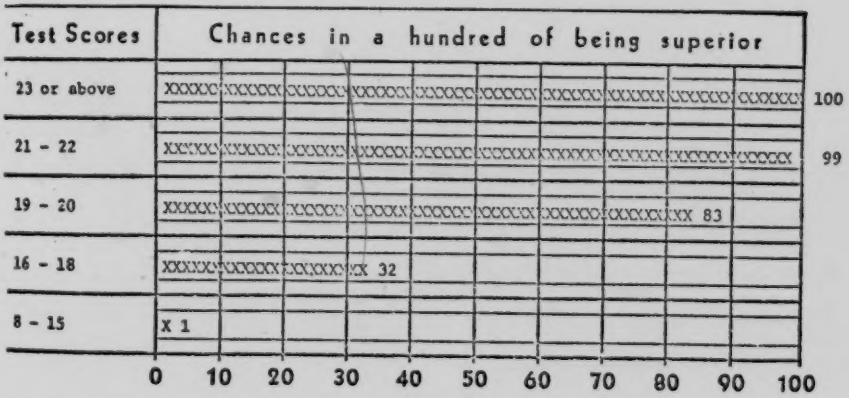
The EEOC Guidelines (as given in the Federal Register on April 21, 1971) state "the presentation of the results of

a validation study must include statistical and, where appropriate, graphic representations of the relationships between the test and the criteria, permitting judgments of the test's utility in making predictions of future work behavior."

To fulfill the graphic representation requirement of the EEOC Guidelines I have prepared and am showing in the figures which follow, expectancy charts for the studies in which the tests can safely be used for hiring and/or promotion.

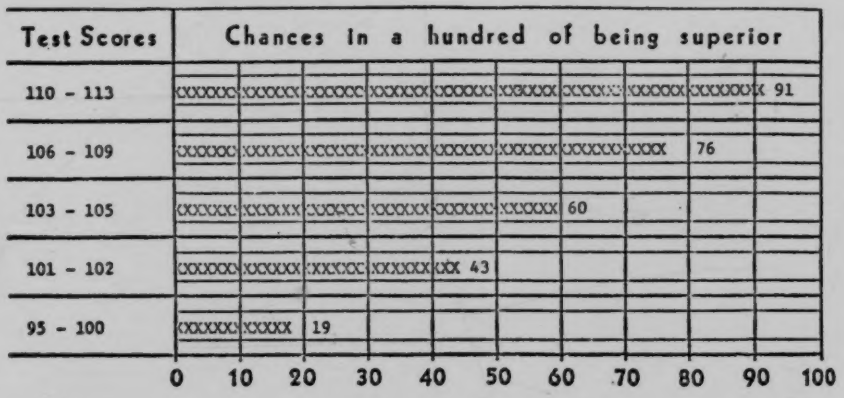
Job Group No. 1

Jobs: Caustic Operator, Lime Kiln Operator
Test: Wonderlic A
Standard of Job Success: Rated in the best 63% of present employees
Number in the sample: 8 men



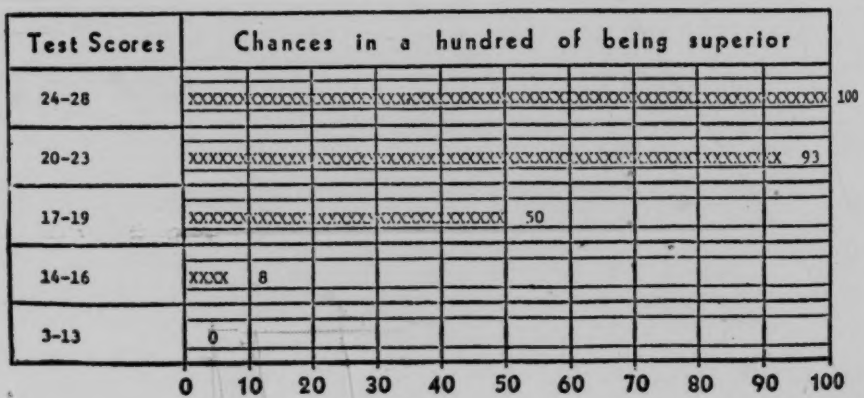
Job Group No. 2

Jobs: C. E. Recovery Operator, C. E. Recovery 1st Helpers and Evaporator Operators
Test: Beta
Standard of Job Success: Rated in the best 58% of present employees
Number in sample: 12 men



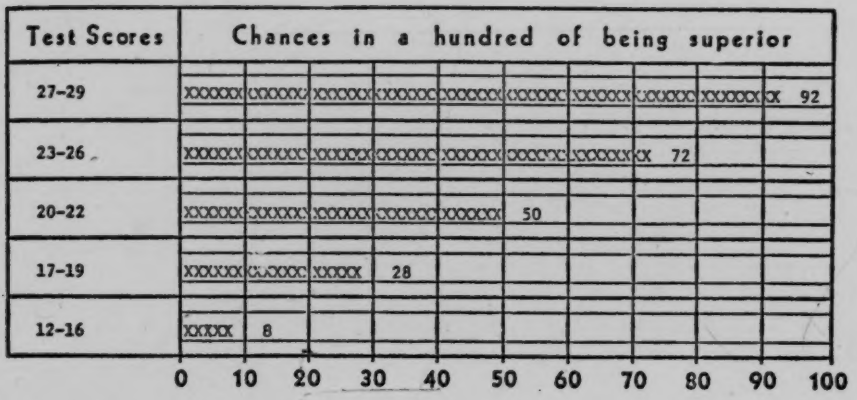
Job Group No. 3

Jobs: Wood Yard: Long Log Operator, Log Stackers, Small Equipment Operators, and Oilers
Test: Wonderlic A
Standard of Job Success: Rated in the best 50% of present employees
Number in Sample: 14 men



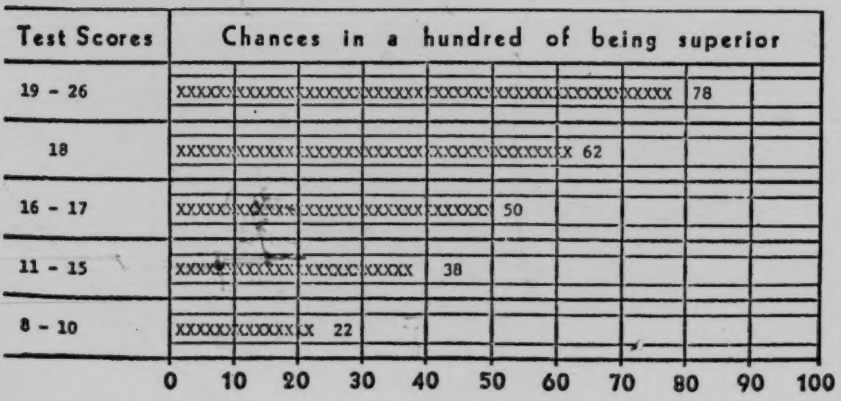
Job Group No. 4

Jobs: B Mill Shift Testmen, Additive Men, Gen. Lab. Testmen, Gen. Lab. Asst., A Mill Testmen, Samplemen
Test: Wonderlic A
Standard of Job Success: Rated in the best 50% of present employees
Number in Sample: 16 men



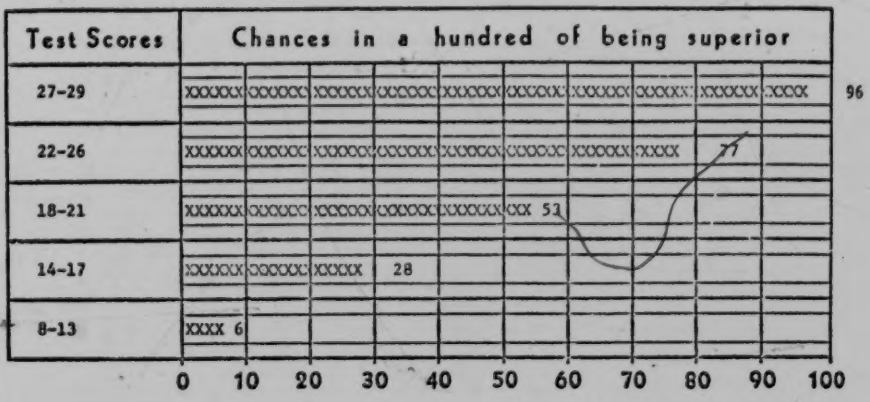
Job Group No. 5

Jobs: B Paper Mill, Machine Tenders and Back Tenders
Test: Wonderlic A
Standard of Job Success: Rated in the best 50% of present employees
Number in the sample: 16 men



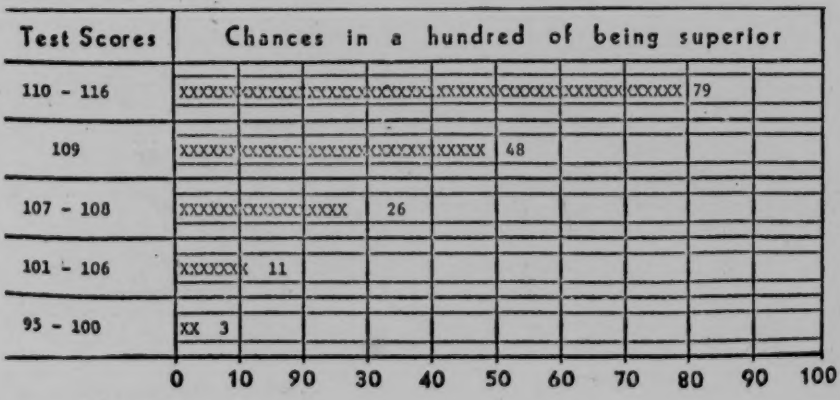
Job Group No. 7

Jobs: B Mill: 4th Hands and 5th Hands
Test: Wonderlic A
Standard of Job Success: Rated in the best 52% of present employees
Number in Sample: 21 men



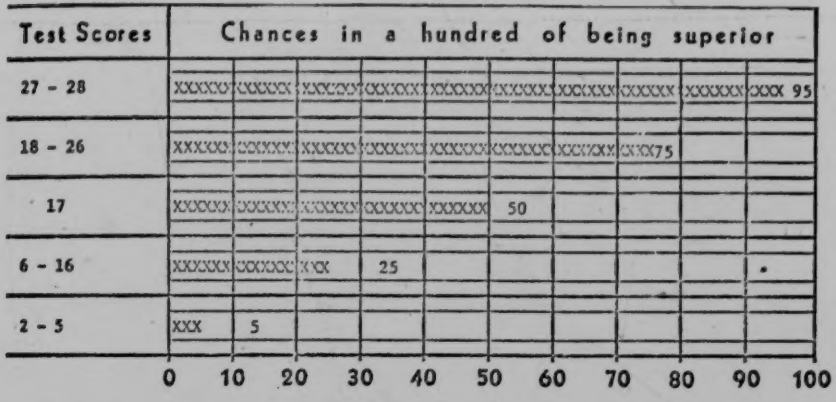
Job Group No. 8

Jobs: Wood Yard: Chipper Unloader, Chipper Operator, No. 2 Chain Operator
Test: Beta
Standard of Job Success: Rated in the best ⅓ of present employees
Number in sample: 6 men



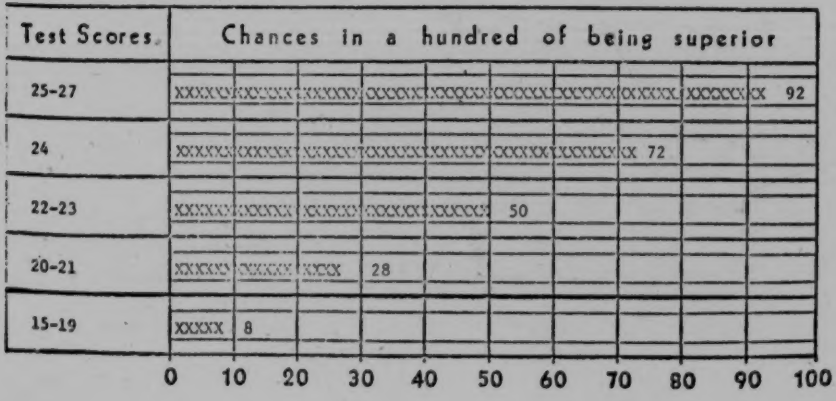
Job Group No. 9

Jobs: Pulp Mill, Stock Room Operator, Stock Room 1st Helpers
Test: Wonderlic A
Standard of Job Success: Rated in the best 57% of present employees
Number in sample: 7 men



Job Group No. 10

Jobs: Power Plant Operators, P. P. 1st Helpers, P. P. 2nd Helpers
Test: Wonderlic A
Standard of Job Success: Rated in the best 50% of present employees
Number in sample: 12 men



General Summary:

Inspection of the correlations and charts shown in this report shows quite conclusively that both the Beta and Wonderlic A tests can be reasonably used for both hiring and promotion for most of the jobs in this mill. The charts indicate that a minimum score of 103 on the Beta for jobs in Recovery and Evaporation and a minimum score of 17 on the Wonderlic A for jobs in the other groups shown in the charts would not be at all out of line. The EEOC could not reasonably object to these standards in the light the validation data covered in this report.

/s/ Joseph Tiffin, PhD

DEFENDANT ALBEMARLE'S EXHIBIT NO. 22

VITA

Joseph Tiffin

July, 1971

Date of Birth: July 4, 1905

Marital Status: Married
Children: One daughter, Mrs. Catherine (Tiffin) Kestle

Education:

B.A., University of South Dakota, 1927
M.A., University of Iowa, 1928
Ph.D., University of Iowa, 1930

Present Position:

Professor of Industrial Psychology, Purdue University. Have been on the Staff at Purdue University since Feb. 1938.

Previous Positions:

National Research Council Fellow, 1930-1931
Staff, University of Iowa, 1931-1937
Staff, Brooklyn College, 1937-1938
Vice Chairman, 6th Regional War Labor Board, Feb. 1 to Mar. 1, 1943

Awards, Affiliations, and Attainments:

Diplomate in Industrial Psychology, American Board of Examiners in Professional Psychology
Member of American Psychological Association, Midwestern Psychological Association, Indiana Psychological Association, Phi Beta Kappa, and Sigma Xi

Past President, Division of Industrial Psychology, American Psychological Association

Honorary Doctor of Optical Science Degree from the Northern Illinois College of Optometry, 1954

Recipient of the Gordon A. Barrows Memorial Award for Distinguished Contribution to Psychology. This Award was made by the Indiana Psychological Association in 1966.

Listed in Who's Who in America and American Men Of Science.

Consulting Activities:

1. Bausch and Lomb Optical Company; 1939 to 1953. During this period, I worked closely with the company in developing the Orthorater, an instrument for use in industry to measure the visual skills of applicants and employees.
2. M & M's Candies, 1957 to 1959. During this period, I developed methods of evaluating consumer reaction to retail packages.
3. Acme Steel Co., 1957 to 1959. Developed a new method of evaluating job performance of factory personnel.
4. Conducted attitude and/or employee morale surveys for the following companies:
   a. Victor Adding Machine Company, Chicago, Illinois
   b. Union Special Machine Company, Chicago, Illinois
   c. International Register Company, Chicago, Illinois
   d. Block's Department Store, Indianapolis, Indiana
   e. National Lead of Ohio, Cincinnati, Ohio
5. Consultant of the A. C. Nielsen Co. 1962 to 1968.

Have developed and administered a battery of personnel tests to identify fieldmen who can be promoted into positions in which they deal directly with Nielsen clients.

6. Consultant of the American Paper Institute, 1965 to present. Analyze the use of personnel tests being made by the member companies of this association.

7. Organized, with Dr. C. H. Lawshe, the Personnel Testing Institute for Business and Industry. During the past 22 years, this Institute has been attended by over 750 personnel men and women from a wide variety of companies.

8. Consultant to Arvin Industries, Inc. Evaluation of candidates for set-up man and trades apprenticeships 1968 to present.

Publications:

Publications from Purdue University

1. Joseph Tiffin, "Testing the Tests" for Employee Selection in Industry. *Proc. of the Purdue Personnel Institute,* 1938, pp. 111-115.
2. Joseph Tiffin and Mack D. Steer, The Vibrograph: A Combination Apparatus for the Speech Laboratory, *Quarterly Journal of Speech,* 1939, 25, 272-278.
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5. F. B. Knight and J. Tiffin, Learning to Read, Write, and Spell, *Volume Library* (Educators Association, Inc., New York, N. Y., 1939) 134-139.

6. Joseph Tiffin, Review of G. W. Gray's "Studies in Experimental Phonetics," *American Journal of Psychology,* 1939, 52, 313-314.

7. J. S. Karslake and Joseph Tiffin, Supplementary Equipment Useful in Research on Eye-Movement, *American Journal of Psychology,* 1939, 52, 625-629.

8. Joseph Tiffin and Mary McKinnis, Phonic Ability: Its Measurement and Relation to Reading Ability, *School and Society,* 1940, 51, 190-192.

9. Joseph Tiffin, F. B. Knight, and C. C. Josey, *The Psychology of Normal People,* (D.C. Heath and Company, 1940) 512 pp.

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12. Joseph Tiffin and F. L. Westhafer, The Relation Between Reaction Time and Temporal Location of the Stimulus on the Tremor Cycle, *Journal of Experimental Psychology,* 1940, 27, No. 3, 318-324.

13. H. R. Goppert, Joseph Tiffin, and H. G. McComb, *Technical Information in Electricity* (Purdue University, 1940).

14. C. C. Stevason, H. G. McComb, and Joseph Tiffin,

Technical Information in Machine Shop (Purdue University, 1940).

15. Dennis H. Price and Joseph Tiffin, *Technical Information in Industrial Mathematics* (Purdue University, 1940).

16. Joseph Tiffin, Manual of Directions: Purdue Vocational Achievement Tests, (Purdue University, 1940).

17. Joseph Tiffin, Wagner Act Quiz, *Factory Management and Maintenance,* November, 1940, pp. 63 and 139-144.

18. Joseph Tiffin and H. B. Rogers, The Selection and Training of Inspectors, *Personnel,* 1941, Vol. 18, No. 1, 14-31.

19. W. F. Long and Joseph Tiffin, A Note on the Use of Graphology by Industry, *The Journal of Applied Psychology,* Vol. XXV, No. 4, 469-471. August, 1941.

20. Joseph Tiffin, Review of Weinland's "General Psychology for Students of Business," *American Journal of Psychology,* IV (1942) p. 154.

21. Edwin Ewart, S. E. Seashore, and Joseph Tiffin, A Factor Analysis of an Industrial Merit Rating Scale, *Journal of Applied Psychology,* Vol. XXV, No. 5, 1941, 481-486.

22. John J. McNamara and Joseph Tiffin, The Distracting Effect of Nearby Cartoons on the Attention Holding Power of Advertisements, *Journal of Applied Psychology,* Vol. XXV, No. 5, 1941, 524-527.

23. Joseph Tiffin, The Placement of the Industrial Em-

ployee, *Journal of the American Medical Association* CXVIII, (1942), pp. 651-652.

24. Joseph Tiffin, Industrial Psychology, (Prentice-Hall, Inc., 1942), pp. XVI-386.

25. Joseph Tiffin and Wayne Musser, Weighting Merit Rating Items, *Journal of Applied Psychology* (XXVI) (1942), pp. 575-583.

26. Joseph Tiffin and Hedwig S. Kuhn, Color Discrimination in Industry, Archives of Ophthalmology XXVIII (1942), pp. 575-583.

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34. Joseph Tiffin, Vision and Industrial Production, *Illuminating Engineering,* XL (1945), pp. 239-257.

35. Joseph Tiffin, Match the Eye to the Job, *Safety Engineering,* XC (July 1945), pp. 32-34.

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Common factors in eye-movements in silent and oral reading. I. H. Anderson and D. E. Swanson.
An eye-voice camera for clinical and research studies. J. Tiffin and G. Fairbanks.
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DEFENDANT ALBEMARLE'S EXHIBIT NO. 24

REVISED BETA EXAMINATION

PREPARED *by* C. E. KELLOGG, Ph. D.,
Associate Professor of Psychology, McGill University.

ASSISTED *by* N. W. MORTON, Ph. D.,
Lecturer in Psychology, McGill University.

	Raw Score	Weighted Score
Test 1		
Test 2		
Test 3		
Test 4		
Test 5		
Test 6		
Total		
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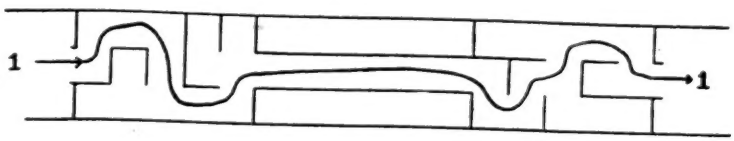

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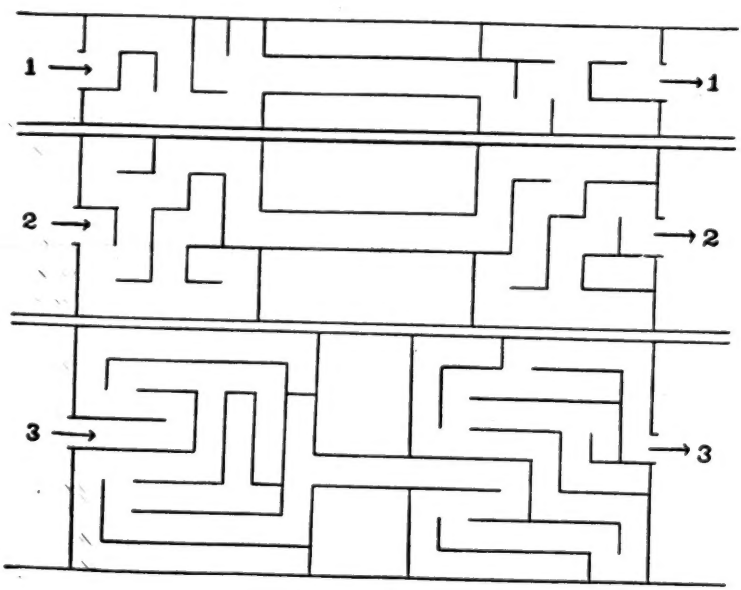

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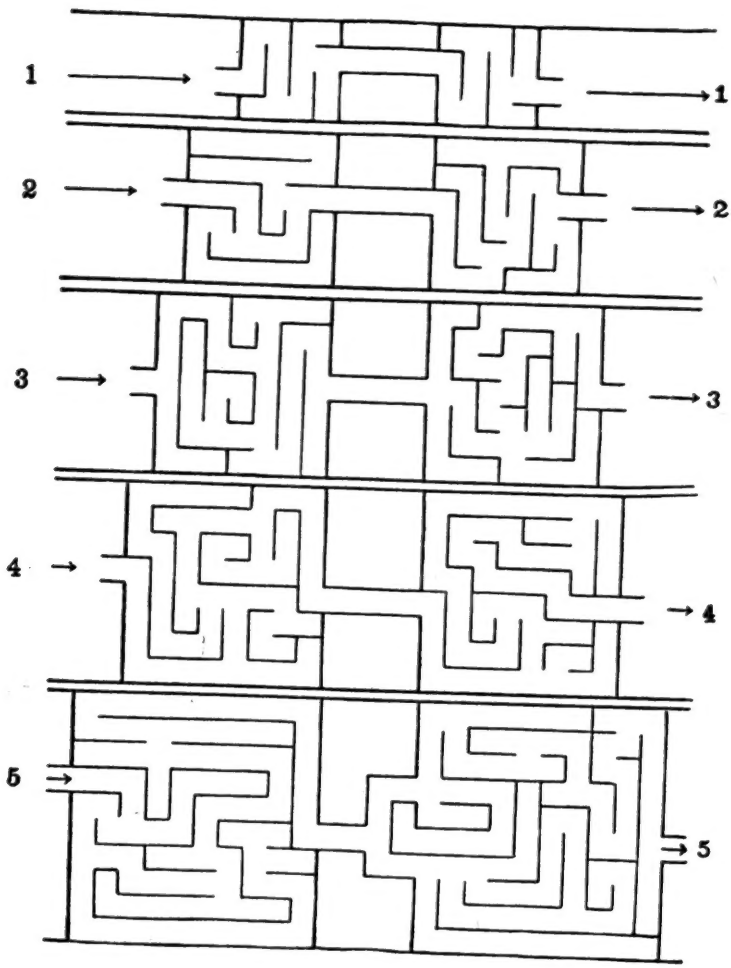

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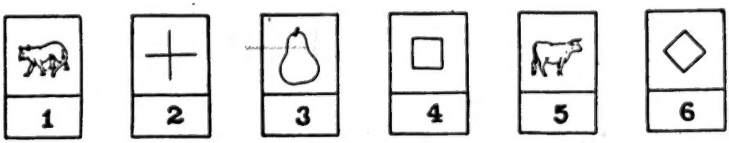

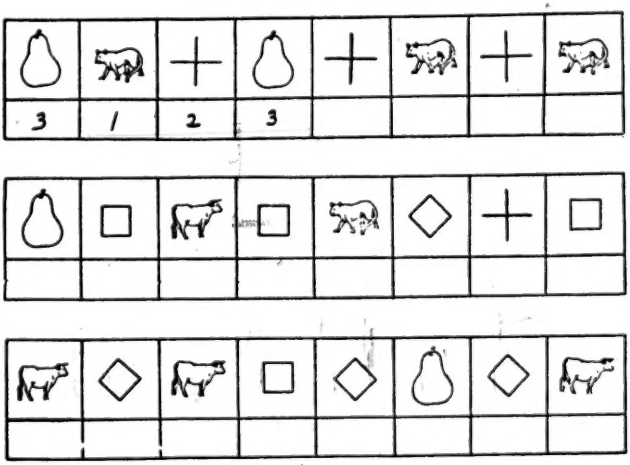

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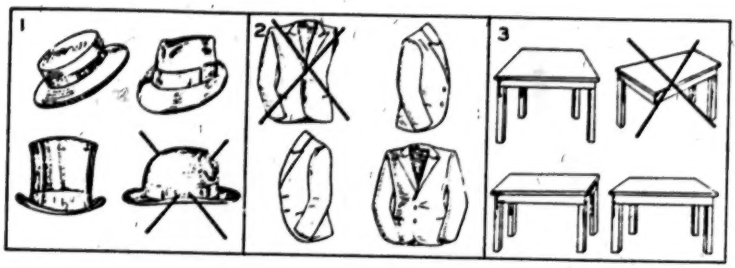

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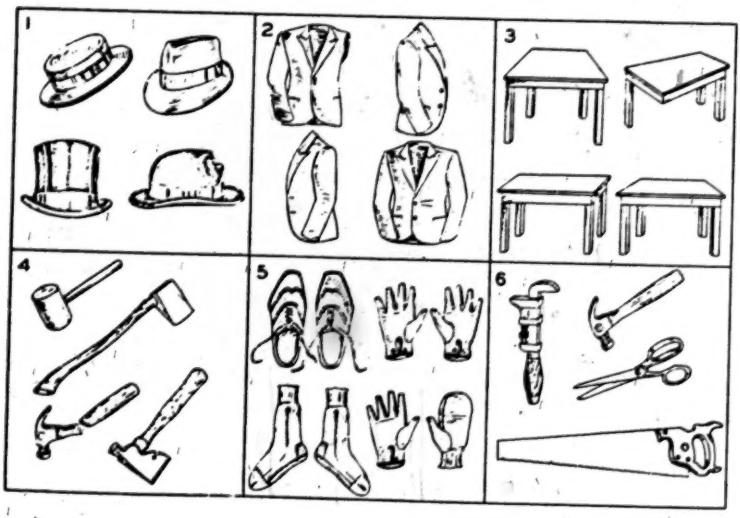

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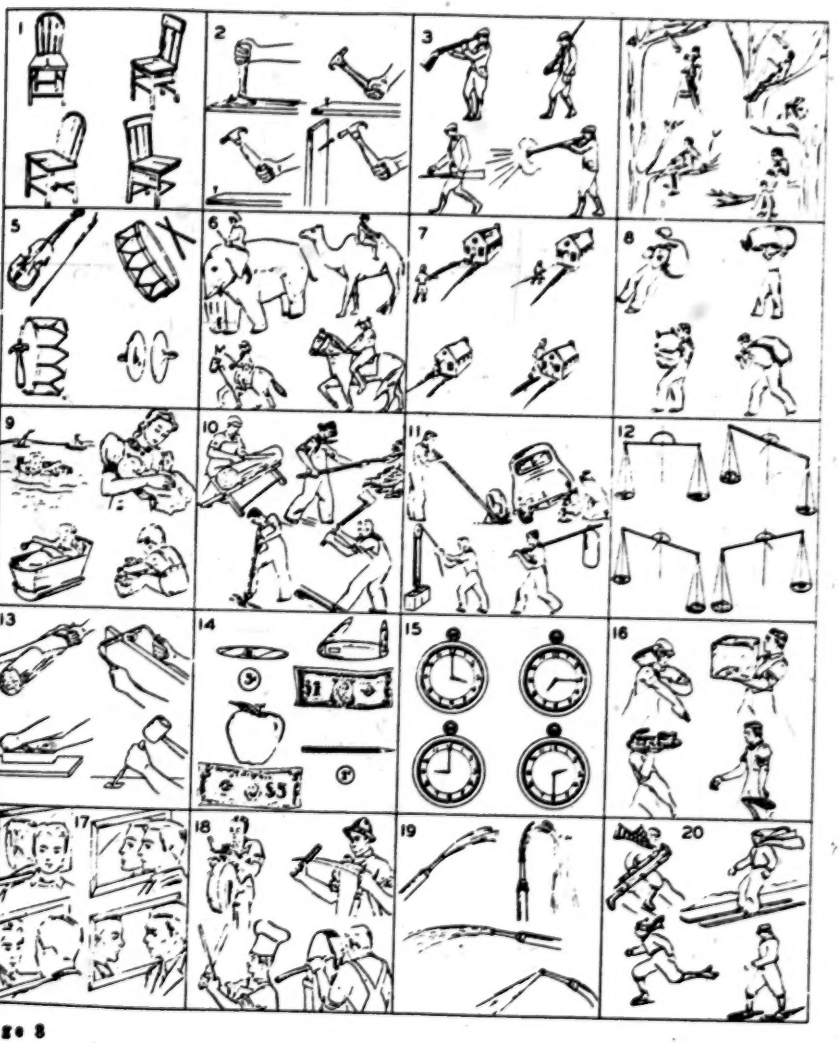

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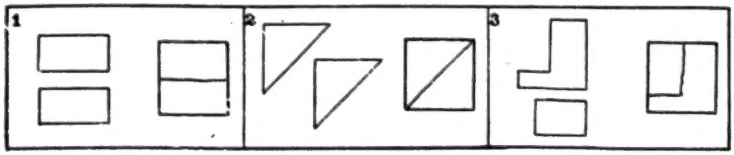

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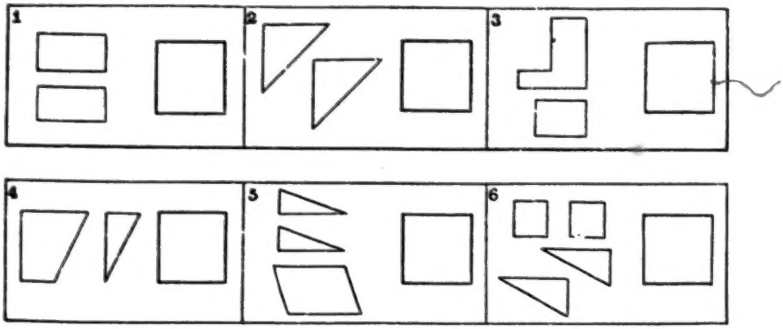

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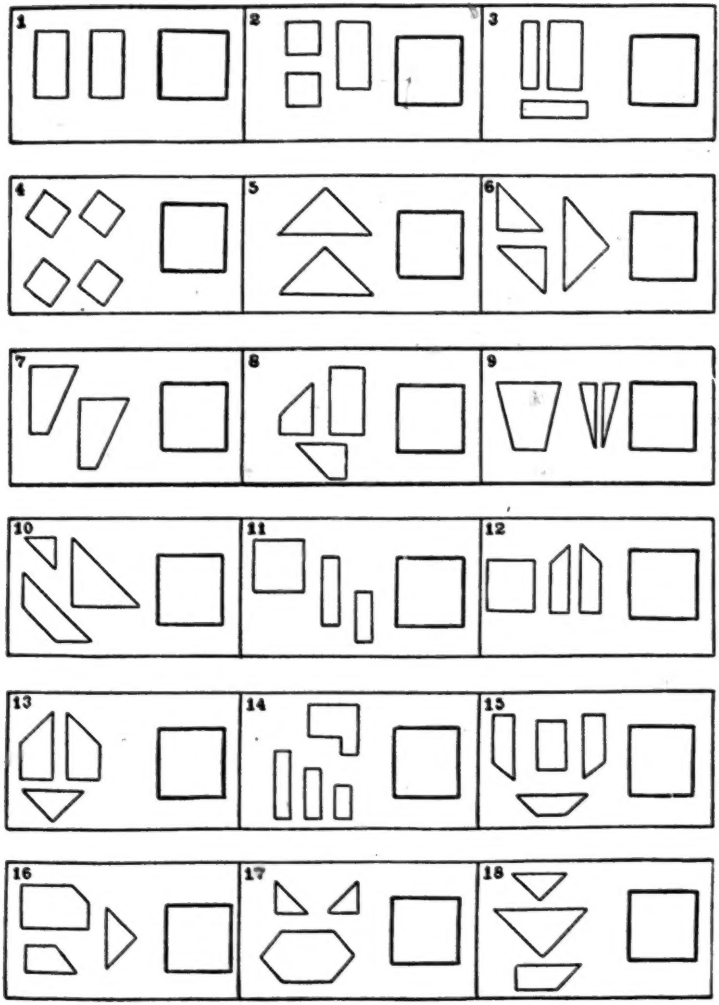

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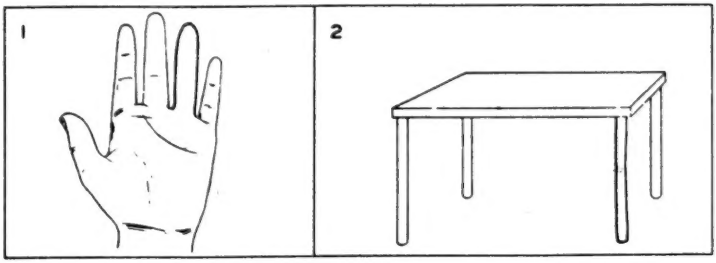

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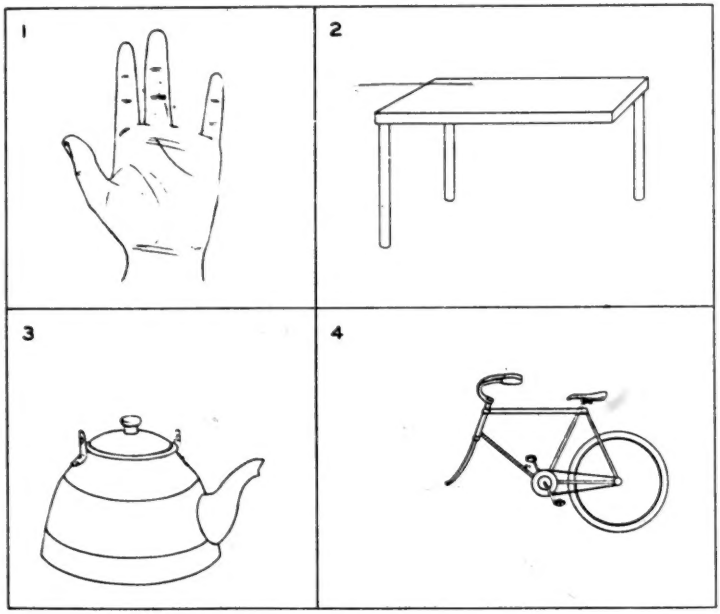

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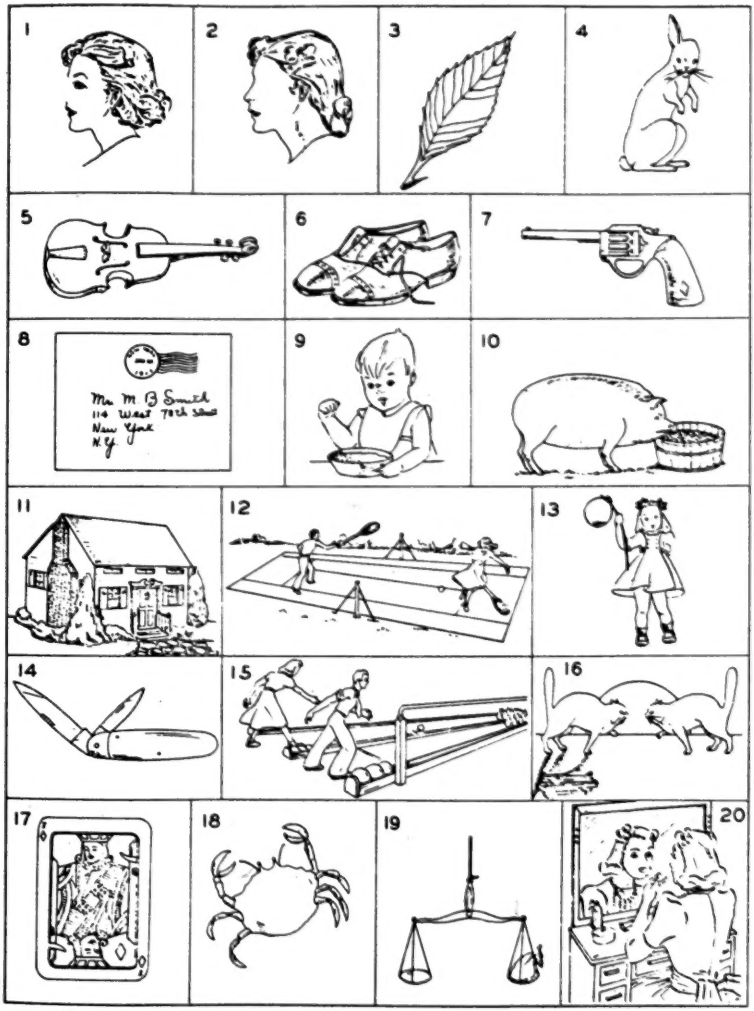
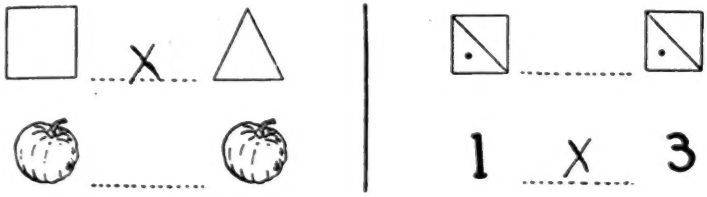


EXERCISE 6



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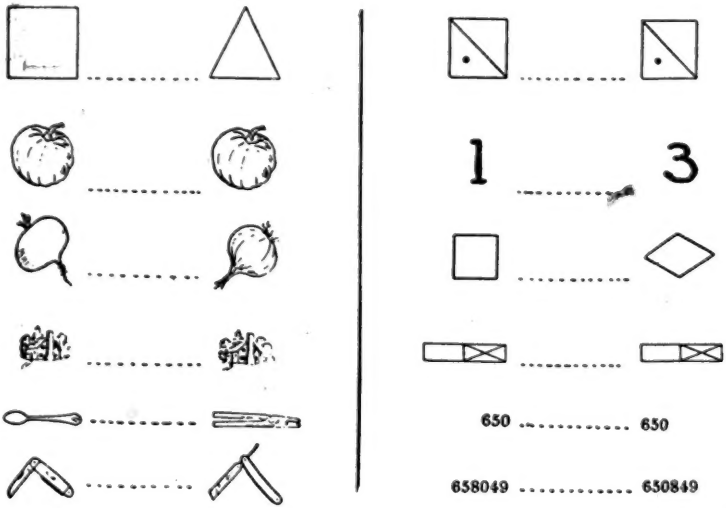

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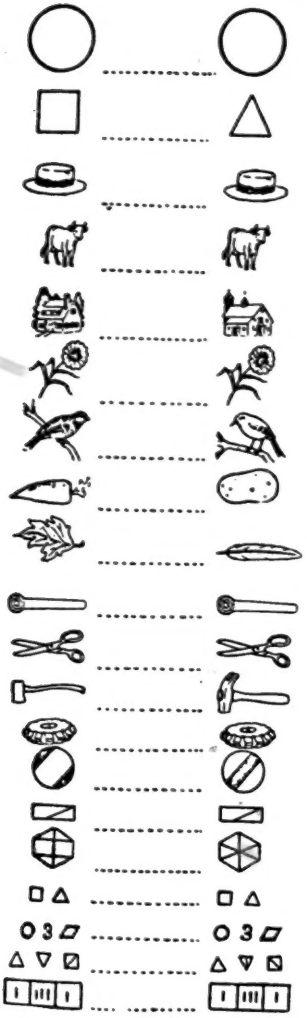

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DEFENDANT HALIFAX LOCAL NO. 425's EXHIBIT NO. 2

Letter from K. D. Running to David L. Mills Dated September 23, 1968

Albemarle Paper Company
Roanoke Rapids Division
Roanoke Rapids, North Carolina 27870

September 23, 1968

Mr. David L. Mills
President, Local No. 425
United Papermakers and Paperworkers
Roanoke Rapids, North Carolina 27870

Dear Mr. Mills:

You and the Union Committee have requested that the Company write you concerning what we have done and are continuing to do to provide more work for long-service employees who are on the extra board. You brought to our attention a few months ago that some of these employees were not getting much work. Since that time, we have taken a number of steps which have resulted in these employees getting more work. We plan to continue to do the things that we have already done to provide them with more work and seek out other ways of favoring these employees with the available work. I think you will agree that both the Company and the Union are very much concerned that these long-service employees receive as much work as can reasonably be provided in line with their qualifications.

Sincerely yours,

K. D. Running
Vice President

KDR/j

In The

UNITED STATES DISTRICT COURT

FOR THE

Eastern District of North Carolina

Wilson Division

Civil No. 989

Joseph P. Moody, et al.,

Plaintiffs,

v.

Albemarle Paper Company, A Virginia Corporation, et al.,

Defendants.

and

Albemarle Paper Company, A Delaware Corporation;
Hoerner Waldorf Corporation, A Delaware Corporation;
First Alpaco Corporation; and
Ethyl Corporation, A Virginia Corporation,

Additional Defendants.

MEMORANDUM OPINION AND ORDER

[Filed November 9, 1971]

APPENDIX A

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

DUPREE, District Judge:—Plaintiffs brought this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., on their own behalf and on behalf of other Negroes similarly situated, alleging violations by their employer and their local union of their rights to equal employment opportunities. Jurisdiction is vested in this court by the Act and by 28 U.S.C. § 1343.

The named plaintiffs are citizens of the United States and of the State of North Carolina, residing in Halifax County, North Carolina. On July 15, 1971, this court entered an order allowing the action to be prosecuted as a class action under Rule 23 of the Federal Rules of Civil Procedure, and the class was defined as (1) all Negroes employed at the Roanoke Rapids plant of Albemarle Paper Company as of June 30, 1967; (2) all Negroes employed at said plant after June 30, 1967, except those whose initial permanent positions were not job classifications limited to or predominantly staffed by Negroes; and (3) all Negroes who may hereafter apply for or be employed at said Roanoke Rapids plant who may be affected by the alleged racially-discriminatory employment practices of the defendants.

The alleged discriminatory employment practices have occurred at a pulp and paper plant in Roanoke Rapids, North Carolina. The multitude of defendants is explained by changes in the corporate ownership of the plant which have occurred since the institution of this action more than five years ago. However, the operation at Roanoke Rapids has at all pertinent times been called the Albemarle Paper Company and, therefore, for purposes of discussion, unless

clarity otherwise dictates, such operation will be referred to as "Albemarle."

The action encompasses all aspects of the hiring and promotion practices within the Roanoke Rapids facility and the application of the provisions of the collective bargaining agreements entered into by it with the defendant Union. The essential issues relate to the educational and testing requirements for employment and promotion utilized at the plant and the effects of the "job seniority" system embodied in the respective union contracts.

This cause was tried by this court without a jury, and having considered the evidence, briefs, oral arguments and the voluminous five-year accumulation of pleadings and other court papers, the court makes the following

Findings of Fact

1. On May 9, 1966 the named plaintiffs filed charges against Albemarle, Halifax Local No. 425 and United Papermakers and Paperworkers, AFL-CIO (United Papermakers) before the Equal Employment Opportunity Commission (EEOC) pursuant to the provisions of Section 706(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(a). These charges raised the issues set forth in the complaint filed with this court.

2. Plaintiffs received letters dated July 28, 1966 from EEOC notifying them that they were entitled to file suit in federal district court under Title VII of the Act. The complaint in this action was timely filed on August 25, 1966.

3. The paper mill was built in 1907 and it began business under the name of Halifax Paper Company. In 1937 a Virginia corporation, Albemarle Paper Company, acquired the

plant. Albemarle Paper Company (Virginia), a wholly owned subsidiary of the defendant Ethyl Corporation, operated the plant at the time this action was filed. On October 31, 1968, the paper mill was transferred to defendant Albemarle Paper Company, a Delaware corporation. Albemarle Paper Company (Delaware) is a wholly owned subsidiary of defendant Hoerner Waldorf Corporation, a Delaware corporation. Albemarle's (Virginia) name was changed to First Alpaco Corporation and thereafter was merged into defendant Ethyl Corporation.

4. There has been a continuation of the business in substantially the same manner in which the business was operated prior to the transfer on October 31, 1968; the plant location is the same; the work force is substantially the same; the jobs and working conditions are substantially the same; the method of production is substantially the same; the products and services provided are substantially the same; and the machinery and equipment are substantially the same.

5. Albemarle is a leading employer in the Roanoke Rapids area. It pays higher wages than most, if not all, industries in the area.

6. At all pertinent times the Albemarle facility at Roanoke Rapids has been an employer in an industry affecting interstate commerce and has more than 100 employees.

7. Defendant Local No. 425 (hereafter referred to as the "Union") is a labor organization which is and has been a party to collective bargaining agreements with Albemarle pertaining to production and maintenance employees at the Roanoke Rapids plant and negotiates on their behalf concerning the wages, terms and conditions of employment with respect to those employees. The Union is a labor organiza-

tion within the meaning of Section 701(d) and (e) of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e(d) and (e).

8. The operations of Albemarle, as is characteristic of pulp and paper mills throughout the United States and Canada, are organized on a departmental basis in accordance with the type of work performed in each department. The jobs within each department generally require skills and ability which differ from one department to another and each department has a specific function of its own in the overall operations of the mill. For purposes of employee classification and promotion, each of the departments is organized into one or more "lines of progression." In all but exceptional circumstances, entrance of new employees into each department is effected at the lowest-paying, least responsible job of the lines of departmental progression and vacancies are filled by promotions within the lines.

9. There are over 100 different jobs at the Roanoke Rapids plant ranging from Janitorial to Complex Machine Operator. Of these, approximately 86 are jobs traditionally reserved for white persons ranging from jobs of Helper and Laborer to Machine Operator.

10. Promotion and demotion within a line of progression is governed by seniority and ability. The 1965 and 1968 labor agreements provide in part that "when all factors that constitute ability are relatively equal, then seniority in keeping with established lines of progression within a given department shall prevail."

11. Thus, the seniority system utilizes "job seniority" for promotions and demotions. This means that the employee who has the greater seniority in the job within the line of progression immediately below the vacancy to be

filled would normally be given the first opportunity to fill the vacancy even though other employees in the same job classification have more plant and departmental seniority, assuming that the person has the necessary ability, experience and training to do the higher job.

12. When a layoff occurs within a line of progression or department, the employees bump downward and the most junior employees are either laid off or offered Call Board work. Employees who are returned to the Call Board or are laid off retain their seniority rights in their former department and line of progression, but do not have a seniority preference to an opening in a different department or line of progression.

13. A 1965 labor agreement provided that employees could request transfers from one department (or line of progression) to another department (or line of progression). This provision was contained in the labor agreements prior to 1965. Whether or not the transfer was granted was within the sole discretion of the company. If an employee transferred at his own request, his seniority in his former department or line of progression ceased immediately unless within thirty days the employee returned to his former department or line of progression because of his health or physical condition. When the transfer was affected at the request of the company, his seniority in the department (or line of progression) left would be retained for a period of six months from the date of transfer. An employee transferred would, therefore, enter at the bottom job in the line of progression and would suffer a reduction in pay if that job to which he was permitted to transfer carried a rate of pay less than the job from which he had transferred.

14. This provision was amended by the 1968 labor agreement to read:

"10.2.1 Employees who wish to transfer from one department (or line of progression) to another may file through their foreman with the Personnel Department of the Company written application stating the department (or line of progression) and the job therein to which he wishes to be transferred. The decision of the Company in granting or denying such request for transfer is to be final. However, when an employee transfers from one department (or line of progression) to another upon his own request, his seniority in the department (and line of progression) left shall cease immediately unless within thirty (30) days from the date of such transfer the health or physical condition of such employee makes it advisable to transfer him back to the department (or line of progression) left. Where the transfer is effected at the request of the Company, his seniority in the department (or line of progression) left shall be retained for a period of six months from date of transfer.

"10.2.2 When the Company grants a transfer as described in 10.2.1, then the transferred employee will be vested with department and job seniority equal to that held in his last job or equal to that held in the lowest job in the line of progression from which transferred.

"10.2.3 When the Company grants such a transfer as described in 10.2.1, then the transferred employee will be paid his present rate if higher than the rate of the job to which transferred until such time as the employee progresses to a job in the new line of pro-

gression which pays as much or more than his rate in his last classification in his former line of progression. An employee who is permitted to carry a higher rate to another department or line of progression shall have such rate reduced to the rate of the job to which he is transferred if the employee is deemed at the time a 'permanent' vacancy occurs in the next higher job in the new line of progression to be unqualified for such job, or with the Company's approval declines a promotion to such a job. Such an employee shall not lose his 'red circle' rate if deemed unqualified and the sole reason for his lack of qualification is a determination by the Company that he has not had sufficient time in the new line of progression to obtain the training and experience necessary for promotion. In applying Section 10.2.1, if the Company decides to fill a vacancy by transferring an employee who has made application pursuant to the foregoing provisions and there are on file more than one such application for the job opening, then the Company will offer the transfer to the senior qualified employee making application."

The rate retention provision referred to in Section 10.2.3 is commonly known as "red circling."

15. Prior to January 1, 1964, Albemarle's lines of progression were strictly segregated on the basis of race. Those lines of progression to which black employees were traditionally assigned were lower paying than the "white" lines of progression. The racial identifiability of jobs and departments in lines of progression were maintained subsequent to the effective date of Title VII (July 2, 1965). As of June 30, 1967, the racial composition of jobs, departments and lines of progression were as follows:

A. *Wood Yard Department*	*Negro*	*White*
Yard Crew		
Crane Operator (Large)	0	9
Long Log Operator	0	4
Log Stacker Operator	0	4
Small Equipment Operator	0	4
Bulldozer Operator	0	1
Oiler	0	4
Chip Unloader	1	3
Chain Operator	0	4
Chipper Operator No. 2		
Chipper Operator No. 1	4	0
Tractor Operator	5	0
Chip Bin Operator	4	0
Laborers	12	0
Knife Grinder*	0	1
Service Crew		
Dempster-Dumper	1	0
Winch Truck Operator	3	0
Winch Truck Operator Helper	1	0
Laborer	6	0
B. *Pulp Mill Department*		
Digester Operator	0	4
Stock Room Operator	0	4
Stock Room First Helper	0	4
Kamyr Operator	0	4
Stock Room Second Helper	0	4
Lead Loader-Blower	0	4
Loader	0	10

* The Knife Grinder is in the Wood Yard Department but is not in a line of progression. This position is occupied by a white person.

	Negro	*White*
CE Recovery Operator	0	4
First Helper No. 6	0	4
Second Helper	0	4
Caustic Operator	0	4
Lime Kiln Operator	0	4
General Utility Operator	0	1
By Products Operator	0	2
Payloader	1	0
Lancer	4	0
Salt Cake Man	1	0
Janitor-Dead End Job	1	0

C. *A Paper Mill Department*

Paper Machine Line Of Progression

Machine Tender No. 1	0	4
Machine Tender No. 2	0	4
Back Tendeer No. 1	0	4
Third Hand No. 1	0	4
Third Hand No. 2	0	4
Fourth Hand No. 1	0	4
Fourth Hand No. 2	0	4
Front Plugger No. 1	0	4
Back Plugger No. 1	1	4
Back Plugger No. 2	0	4
Beaterman	0	4
First Helper	0	4
Brokeman	4	0
Stock Puller	0	0
Laborer	1	0

D. *B Paper Mill Department*

Machine Tender	0	8
Back Tender	0	8

	Negro	*White*
Third Hand	0	8
Fourth Hand	0	8
Fifth Hand	0	8
Sixth Hand	0	8
Seventh Hand	0	4
Spare Hand	1	5
Janitor-Dead End Job	5	0
Stock Room Operator	0	4
Stock Room First Helper	0	4
Stock Room Second Helper	0	4
E. *Product Department B Papermill*		
Sheeter Operator	0	2
Rewinder Operator (large)	0	4
Rewinder Operator Helper (large)	0	4
Rewinder Operator (small)	0	4
Sheeter Operator Helper	0	4
Wrapper, Tier, Capper	1	16
Rewinder Plugger	1	2
Core Cutter	0	2
Janitors	3	0
Scale Clerk	0	5
Lift Truck Operator	0	13
Utility Man	0	8
Laborers	0	6
F. *A Mill Finishing Department*		
Lead Loader	1	0
Lift Truck Operator	1	0
Lead Tier & Wrapper	1	0
Wrapper, Loader & Brokeman	2	0
G. *Boiler Department*		
Boiler Operator	0	4

H. *Power Plant Department*	*Negro*	*White*
Power Plant Operator	0	4
First Helper	0	4
Second Helper	0	4
Utility Man	0	4
I. *Technical Service Department*		
B Mill Shift Testman	0	4
A Mill Shift Testman	0	4
General Lab Testman	0	2
Lab Trainee	1	10
Lab Assistant	0	2
Lab Leadman	0	1
J. *Storeroom Department*		
Storeroom Clerk A	0	2
Storeroom Clerk C	0	1
Storeroom Clerk D	0	0
K. *Maintenance Department Employees*		
1st Maintenance Emp. Appren.	0	1
2nd Maintenance Emp. Appren.	0	9
3rd Maintenance Emp. Appren.	0	4
4th Maintenance Emp. Appren.	0	2
5th Maintenance Emp. Appren.	0	7
6th Maintenance Emp. Appren.	1	0
7th Maintenance Emp. Appren.	0	1
8th Maintenance Emp. Appren.	0	1
"C" Maintenance Employee	0	3
"B" Maintenance Employee	0	3
"A" Maintenance Employee	0	99
Leadman Maintenance Employee	0	7
L. *Miscellaneous*		
General Extra Board	2	62

	Negro	*White*
Utility Extra Board	50	0
Truck Drivers	0	4

The "Extra Boards" of Item "L" above were introduced in the early 1950's for the purpose of maintaining a reservoir of employees who would be available to staff entry level jobs in the various lines of progression. The General Extra Board fed the "skilled" lines of progression and the Utility Extra Board fd the "unskilled" lines of progression. Both were manned by new employees and employees who had been laid off of other jobs and were waiting recall.

16. The 1968 labor contract made certain changes in the lines of progression. The chipper operator and crew lines of progression were merged on the basis of rates of pay into one line of progression, as were the chipper operator and line crew lines of progression and the brokeman and beaterman lines of progression. Separate departments were created out of old departments and the "dead end" job of janitor was eliminated. These changes in the lines of progression had the effect of eliminating, to some extent, their strictly segregated composition. However, it is to be noted that black employees were still "locked" in the lower paying job classifications. For example, the line of progression and the black-white racial composition of the reorganized wood yard department were as follows:

Wood Yard Department

	Negro	*White*
Crane Operator (American)		
Crane Operator (large)	0	9
Long Log Operator	0	4
Log Stacker Operator	0	4
Small Equipment Operator	0	4
Bulldozer Operator	0	1
Oiler	0	4

	Negro	*White*
Chip Unloader	1	3
Chipper Operator No. 2		
Chain Operator	0	4
Chipper Operator No. 1	4	0
Tractor Operator	5	0
Chip Bin Operator	4	0
Laborer	12	0

Thus, the blacks occupied the bottom twenty-five job positions within the wood yard department.

17. The General Extra Board and the Utility Extra Board were merged in 1968. Employees on the merged board still retain recall rights to jobs and lines of progression which they held prior to being reduced to the call board. The effect of this practice is that black employees are recalled to black jobs and white employees are recalled to white jobs.

18. Prior to 1958 no employment personnel tests were given to applicants at the Roanoke Rapids plant. In about 1956 the personnel manager was requested to design a personnel screening program for use in the selection of new employees to be hired for jobs created by the installation of a new paper machine. In this connection two "paper and pencil" tests—the Revised Beta Examination (Beta) and the Bennett Mechanical Comprehension Test—were selected. New employees hired for the General Extra Board and the Maintenance Department were required to score successfully on the Beta as well as have a high school education.

19. In an effort to validate the Beta, the examination was administered to a sample of employees who worked on the No. 3 paper machine, maintenance employees and possibly some employees in the pulp mill. The method that was

followed is known by industrial psychologists as concurrent validation, that is, employees that were tested were then rated by their supervisors on the basis of performance on the job. As a result of this study, a cutoff score of 100 was established for the Beta. No blacks were known to be included in the validation sample.

20. Use of the Bennett Mechanical Test, which had previously been administered to job applicants, was discontinued in about 1963 and the company initiated use of the Wonderlic, A and B series, along with the Beta test. Since that time the two pre-employment tests, the Beta and the Wonderlic, series A and B, have been administered to applicants for Crane Operator (Wood Yard), Digester and C. E. Recovery (Pulp Mill), Paper Machine and Beater (A Paper Mill), Paper Machine and Stock Room (B Paper Mill), Power Plant Operator (Power Plant), Boiler Operator (Boiler Room), Mill and Laboratory (Technical Services) and Finishing and Shipping Crew (B. Mill Product) lines of progression.

21. The Beta examination is a nonverbal test, developed during World War I to measure the intelligence of illiterate and non-English-speaking individuals.

22. The Wonderlic, series A and B, are short, verbal, widely-used intelligence tests. The explanation given for the use of these tests is that it was felt that it was essential for new employees to have certain verbal facilities because of the increasing technical nature of the mill operation. The cutoff score which was utilized for the Wonderlic, series A and B, is 18 on either test.

23. A high school education requirement was introduced in the early 1950's in response to a difficulty in finding qualified people for a modernized pulp mill. It was intended to

assure a certain level of reading skill needed to comprehend the increasingly difficult material which accompanies technological innovations.

24. In December of 1964, Albemarle offered incumbent Negro employees who were then working in the Chipper, Service Crew, Payloader, Brokeman, First Fireman and Lead Loader lines of progression an opportunity to take the personnel tests in order to be considered for jobs in other lines of progression and waived its high school education requirement for incumbent black employees who could successfully pass these tests. This offer was made a second time on November 4, 1965, and some Negro employees took the test and were transferred. However, a majority of those who took the tests failed them.

25. Employees who do not have a high school education and who are in jobs in lines of progression are not required to successfully pass the test battery in order to be considered for future promotions in that line of progression. The policy applies to similarly situated white and black employees.

26. Albemarle has waived the necessity of successfully passing the test battery for a few of the black employees who do not have a high school education. Similarly, exceptions to this practice have been made for white employees.

27. Apart from the standardized lines of progression, Albemarle maintains a maintenance staff which services and repairs machinery throughout the mill. The maintenance staff is not served by the call boards. In 1959 the company with the agreement of the Union established a formalized training program for maintenance employees called the Maintenance Apprenticeship Program. A high school education and passing test scores are required for en-

trance into the program. Three employees selected by the Union and three members selected by the maintenance superintendent periodically review the performance of apprentices and recommend promotion or demotion within the program to the maintenance superintendent. The maintenance program is not divided into functional craft divisions. Thus, all employees in the program must qualify to acquire the skills of a machinist, welder, carpenter, electrician, painter, oiler, pipefitter, rigger, millwright and insulator during the apprenticeship program.

28. In 1964 prior to the effective date of the Civil Rights Act of 1964, the company began actively recruiting black applicants from the local high schools to apply for the Maintenance Apprenticeship Program. In addition, the company solicited applications from black employees working in other departments in the mill. The first black employee entered the program in 1964. There were five blacks in the program by September of 1967 and as of 1970, ten blacks had entered the program. All had successfully met the high school and test qualifications for entrance.

29. After the Supreme Court decision in Griggs v. Duke Power Company, 401 U.S. 424, 3 FEP Cases 175 (1971), Albemarle again conducted validation studies of its testing and educational requirements. The company employed an expert in the field of industrial psychology and testing to conduct the studies. This expert utilized two manuals which outlined generally-accepted procedures for determining criterion-related validity: "Guidelines of Employee Selection Procedures," Equal Employment Opportunity Commission, August 1, 1970, and "Standards for Educational and Psychological Tests and Manuals," published by the American Psychological Association.

30. In a study done on the testing requirements of Albemarle, the expert applied the "concurrent validation" technique to ten specific skill-related job groupings or lines of progression. An attempt was made to include in the sample all of the employees within the designated job groups. Two black employees refused to participate in the study, leaving only four blacks in the selected sample. Given this sample size, it was technically infeasible to validate the tests on a biracial basis.

31. Each employee in a job grouping was individually rated in comparison to every other individual employee in that grouping to obtain a ranking of job performance. The ratings took into consideration the elements of work behavior and job success. This rating method was performed twice by two different supervisors making independent evaluations. Neither of the raters had access to or knowledge of the sample employees' performance on the aptitude tests. The results of the dual ratings were then averaged to obtain the final job rating of the employees within each specific unit.

32. Each rated employee took, or had already taken, three tests—the Wonderlic Form A and Form B and the Beta Examination. The test scores were recorded for each individual. The tests were administered under controlled conditions by a trained personnel employee who had four years of experience administering these particular tests.

33. The sample group rated and tested consisted only of present employees. The group tested was typical of employees in the skilled lines of progression. They were selected from the top and middle of various lines. Professional studies have shown that when tests are validated in such a narrow range of competence, there is a

greater chance that the test will validate even a broader range, that is, if job candidates as well as present employees are tested.

34. The data obtained from the ratings and the data obtained from the test scores were mailed to Purdue University where statistical correlation was performed. The expert correlated the job performance ratings and the test scores using the "Phi coefficient" formula to determine whether successful performance on the test was related to successful performance on the job.

35. The results of the validation study, presented both in statistical and graphical form, showed positive correlations of a statistically significant nature for nine of the ten specific job groupings. More particularly, the study revealed that eight of the ten units correlated positively on at least one of the tests in a manner which could have occurred only by chance only once in a hundred times. One unit correlated positively in a manner that could have occurred only once in twenty times.

36. The conclusion of the validation studies was that "inspection of the correlations and charts shown in this report shows quite conclusively that both the Beta and Wonderlic A tests can be reasonably used for both hiring and promotion for most of the jobs in this mill. The charts indicate that a minimum score of 103 on the Beta for jobs in Recovery and Evaporation and a minimum score of 17 on the Wonderlic A for jobs in the other groups shown in the charts would not be at all out of line."

37. In addition to the validation studies that he performed on the aptitude tests, the defendants' expert undertook a specialized study to determine whether the company's high school requirement bore a significant relation

to the jobs for which it was a prerequisite. Since the high school requirement was instituted in the hope of improving the reading levels of new employees, the expert designed a study to focus on this variable.

38. The EEOC Testing Guidelines provide that "appropriate validation strategies" may be substituted for a criterion-related validity study where the latter is not technically feasible. Under these circumstances, strategies to measure "content" relationships are permitted. In the case of the high school requirement, neither of the two principal criterion-related methodologies were feasible. A "concurrent validation" study was not feasible because present employees did not constitute a statistically fair sample of high school graduates and non-high school graduates. Similarly, a "predictive validation" study was not feasible because that method, by its nature, would require the indiscriminate hiring of high school and non-high school control groups, measuring their performance over an extended period of time, then correlating the data. The company's expert designed a strategy to measure the verbal skills and aptitude needed to comprehend reading material and other "content" which is integral to successful performance on jobs in the skilled lines of progression. For the first phase of this test a professionally-developed formula, the "Flesch Readability Index," was used to measure the reading difficulty of standard Operating Manuals used in the skilled lines of progression at the Roanoke Rapids mill. These manuals contain information relating to the operation of sophisticated machinery. The sample manuals used in the study were chosen by normal "random selection" from a file containing all of the reading material used in the skilled lines. The second phase of the technique employed merely required the expression of the "Flesch Count" in terms of

the relevant criterion to be validated—in this case grades of education.

39. The "Flesch Index," which measures the difficulty of "content" based on syllable/word and word/sentence ratios, revealed that the reading difficulty of the Operating Manuals was such as to require the reading level of a high school graduate with perhaps some college. The expert concluded from his study that an individual must read at least at the level of a normal high school graduate to read the manuals.

40. The Operating Manuals contain information, the knowledge of which is required for the safe and efficient use of the machines and chemicals in the plant.

41. Some industrial psychologists believe that the average scores obtained by blacks as a group on written tests are lower than the average scores obtained by whites as a group. Although the reasons for this are not entirely clear, it is explained in part by the fact that blacks in many parts of the country obtain inferior schooling as compared to whites and, in part by the fact that in some cultural backgrounds where blacks are not accustomed to close working relationships with whites, test scores of blacks are affected by having the test administered by white examiners. This is true not only for blacks but also for Mexicans, Puerto Ricans and whites of a lower income group. Although psychologists have made and are making an effort to construct cultural-free tests, these efforts, in the opinion of some psychologists, have not been successful so far.

42. A personal tour of the defendants' plant in company with counsel for plaintiffs and defendants served to convince the court that much of the machinery now in use is of a highly sophisticated and technically complex nature.

Computers are used extensively throughout the production process as well as in the record-keeping, billing, shipping, purchasing and accounting operations. The efficient maintenance and operation of this machinery and electronic equipment obviously requires employees with a high level of native intelligence, prolonged training and experience.

Conclusions of Law

1. This court has jurisdiction of this action under the provisions of Section 706(f) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f).

2. The corporate defendants are employers in an industry affecting interstate commerce within the meaning of Section 701(b) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(b).

3. The defendant Local 425 is an organization engaged in an industry affecting commerce within the meaning of Section 701(d), (e) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(d), (e).

4. Plaintiffs have complied with the procedural requirements of Section 706(a), (d) and (e) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(a), (d) and (e).

5. Section 703(a) of Title 7, 42 U.S.C. § 2000e-2(a), prohibits an employer from discriminating against an employee "with respect to his compensation, terms, condition, or privileges of employment, because of such individual's race . . . ," or from limiting, segregating or classifying an employee "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race." Subsection (c) of the same sec-

tion defines as unlawful employment practices similar acts when done by a labor union. Subsection (h) provides that

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment *pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race* . . . nor shall it be an unlawful employment practice for an employer to give and to act upon the results of *any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race* . . . ." (Emphasis added.)

6. The Act does not provide redress for discriminatory employment practices occurring prior to July 2, 1965, the effective date of the Act. However, employment practices which tend to perpetuate past discriminations are unlawful unless there is an overriding legitimate, non-racial business necessity, Griggs v. Duke Power Company, 401 U.S. 424, 3 FEP Cases 175 (1971); Robinson v. Lorillard, 444 F.2d 791, 3 FEP Cases 653 (4th Cir. 1971). And Section 706(g) of the Act, 42 U.S.C. § 2000e-5(g), provides for equitable relief only if the court finds that a defendant "has intentionally engaged in or is intentionally engaging in an unlawful employment practice." This provision has been interpreted to require only that the defendant "meant to do what he did, that is, his employment practice was not accidental." See Robinson, supra, at 796 (quoting from Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d at 996, 1 FEP Cases 875, 71 LRRM 3070). Viewed in this light, it is clear that Albemarle

practiced racially discriminatory employment practice prior to July 2, 1965; that the effects of this discrimination has been perpetuated; and that such employment practices are unlawful under Title VII of the Civil Rights Act of 1964.

7. It is undisputed that prior to January 1, 1964, Albemarle's lines of progression were strictly segregated on the basis of race. Negro employees were traditionally assigned to the lower paying lines of progression. Although overt racial discrimination ceased subsequent to the effective date of Title VII, the effects of this racial discrimination have not been eradicated. The job seniority system has resulted in blacks occupying the lower paying positions within an integrated line of progression. Other lines of progression remain essentially segregated because of the inability of black employees to meet the educational and testing requirements to transfer into other, higher-paying lines of progression. It follows that these practices must be enjoined in toto unless they have been shown to be "necessary to the safe and efficient operation of the business." Jones v. Lee Way Motor Freight, 431 F.2d 245, 249, 2 FEP Cases 895 (10th Cir. 1970), cited with approval in Robinson, supra.

8. This court has found as a fact that the efficient maintenance and operation of Albemarle's machinery requires a certain degree of training and experience. However, a system of promotion and demotion based upon *job seniority,* unrelated to the minimum tenure required to gain the necessary proficiency in that job classification, is arbitrary and, when viewed in the context of past discriminatory practices, constitutes an unlawful employment practice. A system of promotion and demotion based on *plant* seniority would accomplish the purpose of awarding faithful employees, and a job residency requirement, based upon the minimum tenure required to gain the skill and proficiency

of a given job classification, would insure the safe and efficient operation of the plant and the promotion of black employees relatively unhindered by past overt acts of employer discrimination. See Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980, 1 FEP Cases 875, 71 LRRM 3070 (5th Cir. 1969); Long v. Georgia Kraft Company, 2 FEP Cases 658 (N.D.Ga. 1970).

9. This court has also found as a fact that a certain level of native intelligence is required for the safe and efficient operation of Albemarle's often complicated and sophisticated machinery. The personnel tests administered at the plant have undergone validation studies and have been proven to be job related. The defendants have carried the burden of proof in proving that these tests are "necessary for the safe and efficient operation of the business" and are, therefore, permitted by the Act. However, the high school education requirement used in conjunction with the testing requirements is unlawful in that the personnel tests alone are adequate to measure the mental ability and reading skills required for the job classifications.

10. In addition to injunctive relief, the plaintiffs seek an award of the amount of pay which would have accrued to them had there been no unlawful practices. 42 U.S.C. § 706(g) provides that the court "*may* . . . order such affirmative relief as *may* be appropriate, including reinstatement or hiring of employees, *with or without back pay.*" The statute thus speaks clearly in terms of the discretionary power of the court. See Local 186, International Pulp, Sulphite and Paper Mill Workers v. Minnesota Mining and Manufacturing Company, 304 F.Supp. 1284, 1 FEP Cases 764, 71 LRRM 2427 (N.D.Ind. 1969). Robinson, supra, can be read to hold that back pay is a compensa-

tion for a tangible economic loss and that the plaintiff is *entitled* to that compensation. However, the Fourth Circuit was there concerned with the defendant's contention that it was an abuse of discretion to *award* back pay. It did not address itself to the clear statutory language of Section 706(g).

In the instant case there was no evidence of bad faith non-compliance with the Act. It appears that the company as early as 1964 began active recruitment of blacks for its Maintenance Apprentice Program. Certain lines of progression were merged on its own initiative, and as judicial decisions expanded the then existing interpretations of the Act, the defendants took steps to correct the abuses without delay. And perhaps unlike the tobacco industry involved in Robinson, supra, the paper industry is justified in requiring that its employees possess a certain degree of training and experience. Furthermore, there is evidence to support a finding that Albemarle has consistently paid higher wages at all levels of employment than those paid by other industries in the area—doubtless a reflection of the sophistication of the industry.

In addition, an award of back pay is an equitable remedy. Robinson, 444 F.2d at 802, supra. The plaintiffs' claim for back pay was filed nearly five years after the institution of this action. It was not prayed for in the pleadings. Although neither party can be charged with deliberate dilatory tactics in bringing this cause to trial, it is apparent that the defendants would be substantially prejudiced by the granting of such affirmative relief. The defendants might have chosen to exercise unusual zeal in having this court determine their rights at an earlier date had they known that back pay would be at issue. See Rental Development Corporation of America v. Lavery, 304 F.2d 839, 842 (9th Cir. 1962), cited with approval in Robinson, supra.

On the basis of the foregoing Findings of Fact and Conclusions of Law it is now

Ordered, Adjudged And Decreed

I. Albemarle Paper Company (Delaware) and Halifax Local 425, United Papermakers and Paperworkers, AFL-CIO, their officers, agents, employees and servants and all persons in active concert or participation with them, are hereby permanently enjoined and restrained from discriminating against the Negro employees of the defendant Albemarle Paper Company (Delaware) at its paper mill in Roanoke Rapids, North Carolina, in violation of Title VII of the Civil Rights Act of 1964.

A. In particular, the defendants are ordered to abolish the existing seniority system based substantially on job seniority and to refrain from negotiating or implementing any other seniority system designed to discriminate or having the effect of discriminating against Negro employees, insofar as such systems may apply to permanent job assignments, and permanent promotions and lay-offs of employees in the affected class, in competition with other employees at the Roanoke Rapids paper mill of Albemarle Paper Company (Delaware).

B. In place of the seniority system so abolished, the defendants are ordered to implement and permanently continue a system of plant seniority with respect to permanent job assignments and permanent promotions and layoffs of employees in the affected class, so that in making permanent promotions or demotions within a line of progression, or in making permanent transfers, promotions or demotions to or from a line of progression, when employees of the affected class are competing with employees not of the affected class, and the qualifications of the competitors are

relatively equal, plant seniority rather than job seniority shall govern. Albemarle Paper Company (Delaware) shall not discriminate on the basis of race in making any temporary assignments, promotions, layoffs or demotions at its Roanoke Rapids plant.

C. Plant or mill seniority shall be determined as length of continuous service from most recent date of permanent employment.

D. Qualifications as used immediately above and elsewhere in this decree shall be deemed to refer to (1) ability and fitness, (2) knowledge and training, and (3) experience and skill developed during an employee's tenure at the mill. Where a member of the affected class with higher plant seniority competes for a job with a non-member having lower plant seniority, the latter shall not be deemed more qualified for promotion simply because of ability, fitness, knowledge, training, experience or skill which are the product of his longer tenure in job slots immediately below the vacancy, subject, however, to the use of reasonable residency requirements in job slots within lines of progression as set forth in Appendix A to this decree. The residency requirements of Appendix A are subject to amendment if the parties, within thirty days, submit additional evidence or stipulations bearing on the minimum on-the-job training requirements for safety and proficiency in a given job classification.

E. In making permanent promotions within a line of progression, or in making permanent transfers, promotions or demotions to or from a line of progression, the lowest paying job in each line of progression shall be the proper job for beginning in the line, and proper progression shall be to the job next higher than that currently held by the employee.

F. Normal seniority provisions, without the modifications of this decree, shall prevail in making permanent promotions or demotions:

1. When employees not of the affected class compete with each other, such as when no employees in the job classification from which the promotion or demotion is to be made are of the affected class, or when there are two or more employees not of the affected class who have longer company service than an affected class employee in the job classification from which the promotion or demotion is to be made;

2. When employees of the affected class compete with each other, such as when all employees in the job classification from which the promotion or demotion is to be made are of the affected class, or when there are two or more employees of the affected class who have longer company service than an employee who is not of the affected class in the job classification from which the promotion or demotion is to be made.

G. Employees who are transferred from one line of progression to another shall carry their seniority and wage rate as provided in Section 10.2.2 and 10.2.3 of the current Labor Agreement, except that in no event shall the rate retention right or "Red Circle" rate exceed $3.36 per hour (straight time). The "Red Circle" protection provided in this paragraph shall apply to only one transfer made pursuant to this decree.

H. Defendants are directed to amend the seniority provisions of Section 10 of the Labor Agreement to provide for the posting of all permanent vacancies to entry level jobs in the various lines of progression as contained in Ap-

pendix A. Such posting shall be for three (3) calendar days on the clock house bulletin board.

I. The defendants are permanently enjoined and restrained from requiring a high school education as a prerequisite for employment, promotion or transfer.

II. The defendants are directed to amend the Labor Agreement to include provisions for assignments from the Call Board incorporating the following terms:

A. Immediately after a determination has been made of available job assignments, and prior to any assignments being made, employees meeting the shift who have recall rights to any job listed must indicate to the clock room attendant whether or not they wish to exercise such recall rights.

B. Thereafter the senior qualified employee meeting the shift in terms of plant or mill seniority will be given the choice of all the then available jobs. Succeeding offers will been made to those meeting the shift in order of their decreasing mill seniority.

C. Requests coming in after posting of the lists and the start of assignments shall be immediately made available to those meeting the shift who have not already received assignments.

III. The request for abolition of or changes in testing procedures is denied for the reasons set forth in the Findings of Fact and Conclusions of Law.

IV. The request for an award of back pay is denied for the reasons set forth in the Findings of Fact and Conclusions of Law.

V. Counsel for the parties are directed to confer among

themselves in an effort to reach an agreement on reasonable attorneys' fees for plaintiffs' counsel and the apportionment thereof among the defendants. They shall report to the court within thirty days of the entry of this decree whether they have been able to reach an agreement, and if not the court will then determine the amount of fees and their apportionment.

It Is So Ordered.

Appendix A

Method For Calculating Residency Requirements

When calculating time spent on a particular job for purposes of determining when the residency requirement has been satisfied, the following will be counted toward satisfaction of the residency requirement of a particular job classification:

1. Time worked while permanently assigned to the job in question.

2. Time worked while permanently assigned to a job below the job in question but assigned on a temporary basis to the job in question, provided such temporary time on the job equals or exceeds 48 hours in any calendar month, in which case all such temporary time in that month will be counted. In the event that temporary time on a particular job does not amount to 48 hours in one calendar month, all such temporary time in that month will be counted toward satisfying the residency requirement of the job to which the employee is then permanently assigned.

Time worked on either a permanent or temporary basis as defined above shall satisfy residency requirements as follows:

1. 172 hours actually worked shall satisfy one month of residency.

2. 40 hours actually worked shall satisfy one week of residency.

Residency Requirements

Wood Yard Department	
Crane Operator (American)	
Crane Operator (Large)	11 mos.
Long Log Operator	9 mos.
Log Stacker Operator	8 mos.
Small Equipment Operator	8 mos.
Bulldozer Operator	6 mos.
Oiler	6 mos.
Chip Unloader	3 mos.
Chipper Operator No. 2	3 mos.
Chain Operator	3 mos.
Chipper Operator No. 1	3 mos.
Tractor Operator	3 mos.
Chip Bin Operator	3 mos.
Laborer	1 mo.
Pulp Mill Department	
Digester Operator (Cooker)	
Stock Room Operator	12 mos.
Stock Room First Helper	12 mos.
Stock Room Second Helper	6 mos.
C. E. Recovery Operator	
1st Helper No. 6	15 mos.
Evaporator Operator (when used)	12 mos.
1st Helper No. 5	12 mos.
2nd Helper	9 mos.
Utility Helper	4 mos.
Caustic Operator	
Lime Kiln Operator	12 mos.
By Products Operator	

Leadloader—Blower	9 mos.
Loader	6 mos.
Power Plant	
Power Plant Operator	
1st Helper	18 mos.
2nd Helper	12 mos.
B Mill Shipping	
Scale Clerk	
Lift Truck Operator	12 mos.
Utility Man	9 mos.
Laborer	3 mos.
Boiler Room Department	
Boiler Operator	
Bark Burner Operator	10 mos.
1st Fireman	9 mos.
2nd Fireman	6 mos.
Laborer	3 mos.
B Paper Mill Department	
Paper Machine Progression	
Machine Tender	
Back Tender	36 mos.
3rd Hand	24 mos.
4th Hand	12 mos.
5th Hand	4 mos.
6th Hand	2 mos.
7th Hand	1 mo.
Stock Room Progression	
Stock Room Operator	
Stock Room 1st Helper	12 mos.
Stock Room 2nd Helper	6 mos.

Technical Service	
Mill Progression	
B Mill Shift Testman	
Additive Man	15 mos.
Laboratory	
General Lab Testman	
General Lab Assistant	15 mos.
Sampleman	6 mos.
Trainee	3 mos.
Service Department	
Payloader	
Dempster-Dumpster Operator	10 mos.
Winch Truck Operator	9 mos.
Truck Operator	9 mos.
Winch Truck Operator Helper	3 mos.
Laborer	1 mo.
Store Room Department	
Storeroom Clerk A	
Storeroom Clerk B	6 mos.
Storeroom Clerk C	6 mos.
Storeroom Clerk D	6 mos.
A Paper Mill Department	
Paper Machine	
Machine Tender No. 1	
Machine Tender No. 2	30 mos.
Back Tender No. 1	26 mos.
Back Tender No. 2	26 mos.
Third Hand No. 1	24 mos.
Third Hand No. 2	24 mos.

Fourth Hand No. 1	12 mos.
Fourth Hand No. 2	12 mos.
Front Plugger No. 1	4 mos.
Back Plugger No. 1	4 mos.
Back Plugger No. 2	3 mos.
A Paper Mill Department	
Beater Room	
Beaterman	
1st Helper	12 mos.
Brokeman	6 mos.
Shipping Room Department A Mill	
Lead Loader	
Lift Truck Operator	12 mos.
Lead Tier and Wrapper	6 mos.
Wrapper, Loader, Laborer	3 mos.

* * *

In The

UNITED STATES DISTRICT COURT

FOR THE

Eastern District Of North Carolina

Wilson Division

[Title Omitted in Printing]

MOTION TO ALTER OR AMEND THE JUDGMENT ENTERED ON NOVEMBER 9, 1971

[Filed November 22, 1971]

Plaintiffs, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, moves the court to alter or amend the judgment entered in this action on November 9, 1971, insofar as said judgment fails to award plaintiffs their costs of this action and said judgment fails to provide for the retention of jurisdiction by the court for the enforcement of said judgment.

As grounds for this Motion plaintiffs show the court as follows:

1. Section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-5(k), provides that in any action brought under this title the court, in its discretion, may allow the prevailing party a reasonable attorneys' fee as part of the costs. The only item of costs allowed in the judgment were attorneys' fees. The judgment should be altered or amended to allow not only attorneys' fees but other items of costs recoverable under federal law.

2. The judgment fails to provide for the retention of jurisdiction of this action for a reasonable period to insure compliance by the defendants with its terms. The nature of the claim asserted in this cause and the finding by the court that the effects of racial discrimination engaged in by the defendants were not eradicated as of the date of the entry of the judgment mandates a provision by which the court specially retains jurisdiction of this action for a reasonable period of time to assure compliance by the defendants with the terms of the judgment.

Wherefore, for the reasons stated above, plaintiffs respectfully pray the court to alter or amend its November 9, 1971 judgment to include the matters set forth in this Motion.

This ..... day of November, 1971.

Respectfully submitted,

/s/ .....
Robert Belton

J. LeVonne Chambers
Chambers, Stein, Ferguson & Lanning
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Charlotte, North Carolina 28202

T. T. Clayton
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Post Office Box 236
Warrenton, North Carolina

Conrad O. Pearson
203½ East Chapel Hill Street
Durham, North Carolina

LETTER FROM THE HON. F. T. DUPREE, JUDGE RE: MOTION TO ALTER OR AMEND

November 22, 1971

Mr. Charles O'Connell
Mr. Rodger L. Nordbye
Mr. J. LeVonne Chambers
Mr. Bonner D. Sawyer
Mr. James B. Ledford
Mr. Julian R. Allsbrook, Jr.
Mr. William L. Robinson
Mr. Conrad O. Pearson
Mr. Charles F. Blanchard
Mr. Warren Woods
Mr. Francis V. Lowden, Jr.
Mr. T. T. Clayton

Re: Civil No. 989—Wilson Division
Moody, et al. v. Albemarle, et al.

Gentlemen:

With reference to plaintiffs' motion to amend the decree of November 9, 1971, in the absence of objection and request to be heard, the final order to be entered when the matter of attorneys' fees has been settled will award costs in the action to the plaintiffs, and in any event will provide for a retention of jurisdiction pending implementation by defendant Albemarle of the injunctive provisions of the decree.

Sincerely yours,

/s/ F. T. Dupree, Jr.
F. T. Dupree, Jr.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 72-1267

Joseph P. Moody, et al.,

Appellants,

v.

Albemarle Paper Company, et al.,

Appellees.

OPINION

[Entered February 20, 1973]

Before Boreman and Bryan, Senior Circuit Judges, and Craven, Circuit Judge.

Craven, Circuit Judge:

This is a class action arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. Plaintiffs are representative members of the class composed of all Negroes employed at defendant's Roanoke Rapids plant and all Negroes who may hereafter apply for employment at the Roanoke Rapids plant. The multitude of defendants is occasioned by changes in corporate ownership which occurred subsequent to the institution of the action. Since the Roanoke Rapids operation has at all pertinent times been called the Albemarle Paper Company, the corporate defendants will hereinafter be referred to as Albemarle.

The district court found that Albemarle practiced racially discriminatory employment practices prior to July 2, 1965, and that the effect of that discrimination had been perpetuated through a job seniority system. Thus, the district court enjoined Albemarle and the defendant union, Halifax Local 425, United Papermakers and Paperworkers, AFL-CIO, from discriminating against Negro employees, and ordered that the job seniority system be abolished and a plant-wide seniority system be implemented. There has been no appeal from these provisions of the court's decree.

The district court refused to order the abolition of or changes in the pre-employment testing procedures used by Albemarle. Plaintiffs appeal from the district court's determination. Judge Boreman concurs with Judge Craven in reversing and remanding to the district court on this issue. Judge Bryan dissents.

The district court also refused to award the plaintiffs back pay. Judge Bryan concurs with Judge Craven in reversing the district court on this issue. Judge Boreman dissents.

The effect of this division in the court is to reverse and remand the district court's determination as to the testing procedures and the refusal to award back pay.

I

Testing Procedures

Prior to 1958, no employment personnel tests were given to applicants for employment at Albemarle. In 1956, the personnel manager was requested to design a screening program for selection of employees for certain departments. In this connection, the Revised Beta Examination (Beta) and the Bennett Mechanical Comprehension were selected to test applicants. A brief study was made at that time to determine the usefulness of the Beta test.

About 1963, the then personnel manager discontinued using the Bennett Mechanical Test since it had not been studied. Use of the Wonderlic Test, A and B series, was initiated at that time. Whereas the Beta is a non-verbal test developed to measure the intelligence of illiterate and non-English speaking individuals, the Wonderlic Tests are *verbal* tests of general mental ability. Use of the Wonderlic Tests was adopted in connection with the Beta because Albemarle felt it essential for new employees to have a certain level of verbal facility because of the increasing technical nature of the operation and the increasing use of printed instructions in the operation of machinery and the like.

The operations of Albemarle are, like other pulp and

paper mills, organized on a departmental basis. For purposes of employee classification and promotion, each department is organized into one or more lines of progression. Entrance into each department is effected at the bottom of a line of progression and employees move up, depending on their ability and experience, as vacancies occur. In all, Albemarle has 11 separate departments containing 17 lines of progression. Since 1963, applicants for 8 of these departments and 14 of the lines of progression were required to score successfully on the Beta and Wonderlic pre-employment tests.

After the Supreme Court decision in Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), Albemarle hired an expert in industrial psychology and testing to conduct a validation study of its pre-employment testing procedures. A validation study determines whether test results have a significant relationship to actual performance on the job. The technique adopted for the validation study of Albemarle's tests was concurrent validation. In concurrent validation, a sample of current employees occupying the jobs, or job groups, in question is selected. These employees are then given the tests, and the test scores compared with one or more criteria of the employee's ability to perform their jobs.

Albemarle's validation study covered 10 job groups in only 8 of the 14 lines of progression, and 5 of the 8 departments for which the tests are required. The sample of employees was generally selected from the higher level jobs and encompassed approximately 30 percent of the different jobs for which tests are required. The test scores from that sample were compared with two supervisors' comparative ratings of employees in each job slot. The criteria for the supervisors' ratings was: "Excluding a man's attitude, just

how well the guy can do the job when he's feeling right." (A. 471). No job analysis was done for the jobs in question.

Albemarle's expert found that one of the tests was validated for 9 of the 10 job groups studied. However, both tests were valid for only one job group.

The effect of the district court's approval of Albemarle's testing procedure is to approve a validation study done without job analysis, to allow Albemarle to require tests for 6 lines of progression where there has been no validation study at all, and to allow Albemarle to require a person to pass two tests for entrance into 7 lines of progression when only one of those tests was validated for that line of progression. We think this was error.

[1] Title VII of the Civil Rights Act "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." Griggs v. Duke Power Co., 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed. 2d 158 (1971). If an employment practice, though facially neutral as the testing procedures here, is shown to have a differential impact on minority employment, it is prohibited unless the employer can prove business necessity. *Griggs,* at 432, 91 S.Ct. 849. The plaintiffs made a sufficient showing below that Albemarle's testing procedures have a racial impact.[1] It was thus incumbent upon Albemarle to establish business necessity[2] by showing that its testing requirements

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[1] It was demonstrated in plaintiff's exhibits that on the Wonderlic Series 96 percent of whites passed as opposed to 64 percent of blacks. This corresponds with the natural average as determined in a study by the authors of the test. Negro Norms. A Study of 38,452 Job Applicants for Affirmative Action Programs, E. F. Wonderlic & Assoc., Inc. (1970).

[2] "[T]he applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business.

"have a manifest relationship to the employment in question." *Griggs*, at 432, 91 S.Ct. at 854. United States v. Jacksonville Terminal Co., 451 F.2d 418, 455-457 (5th Cir. 1971).

While § 703(a)(2), (h)[3] specifically authorizes professionally developed tests not used to discriminate, *Griggs* makes clear that that section allows only those tests proven to be job related. 401 U.S. at 436, 91 S.Ct. 849. In so holding, the Court gave great deference to the interpretation of the Act evinced in a set of guidelines by the enforcing agency, the Equal Employment Opportunity Commission. *Griggs*, at 433-434, 91 S.Ct. 849. We have also recently noted with approval these guidelines. Robinson v. Lorillard Corp., 444 F.2d 791, 798 n. 7 (4th Cir. 1971).

[2] We think Albemarle has failed in several respects to show that its tests are job related, have a manifest relationship to employment, and have been validated in accordance with EEOC guidelines.

In developing criteria of job performance by which to

Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative polices or practices which would better accomplish the business purpose advanced, or accomplished it equally well with a lesser differential impact."
Robinson v. Lorillard Corp., 44 F.2d 791, 798 (4th Cir. 1971). *See also*, Note, Employment Testing: The Aftermath of Griggs v. Duke Power Company, 72 Colum.L.Rev. 900, 908 (1972).

[3] § 703(a)(2), (h) provides in relevant part:

"Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin."

42 U.S.C.A. § 2000e-2(h).

ascertain the validity of its tests, Albemarle failed to engage in any job analysis. Instead, test results were compared with possibly subjective rating of supervisors who were given a vague standard by which to judge job performance. Other courts have expressed skepticism about the value of such ill-defined supervisor appraisals. *See, e. g.,* Rowe v. General Motors Corp., 457 F.2d 348, 452 (5th Cir. 1972). Also Cooper and Sobol have stated in their article, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv.L.Rev. 1598, 1662 (1969):

> Supervisory ratings, for example, which are possibly the single most common performance measure used in validity studies, are subject to personal prejudice. When test scores are correlated with such ratings, the validation, if it can be called that, is of questionable value and may simply prove that the test has the same bias as the supervisors.

Likewise, in this regard the EEOC guidelines provide:

> (3) The work behaviors or other criteria of employee adequacy which the test is intended to predict or identify must be fully described; and, additionally, in the case of rating techniques the appraisal form(s) and instructions to the rater(s) must be included as part of the validation evidence. Such criteria may include measures other than actual work proficiency, such as training time, supervisory ratings, regularity of attendance and tenure. Whatever criteria are used they must represent major or critical work behaviors as revealed by careful job analyses.
>
> (4) In view of the possibility of bias inherent in subjective evaluation, supervisory rating techniques

should be carefully developed, and the ratings should be closely examined for evidence of bias.

* * *

29 C.F.R. § 1607.5(b) (1970).

We agree that some form of job analysis resulting in specific and objective criteria for supervisory ratings is crucial to a proper concurrent validation study. *See,* Western Addition Community Organization v. Alioto, 340 F.Supp. 1351, 1354-1355 (N.D. Cal. 1972). To require less is to leave the job relatedness requirement largely to the good faith of the employer and his supervisors. The complaining class is entitled to more under the Act.

[3] Even if the validation procedures had been proper, it was error to approve the testing procedures for lines of progression where there had been no validation study. In this case the tests were approved as a requirement for 6 lines of progression for which the tests had not been validated. While it is true that a test need not always be validated for each job for which it is required, there are narrow limits on when a test may be used without validation. The EEOC guidelines provide:

> (2) Where a test is to be used in different units of a multiunit organization and no significant differences exist between units, jobs, and applicant populations, evidence obtained in one unit may suffice for the others. 29 C.F.R. § 1607.4(c) (1970).

In this case, a failure to perform job analyses in the lines of progression involved in the validation study and in the other lines of progression for which the tests are required

prevents concluding that no significant differences exist in the jobs in question.[4]

Not only was it error to approve the testing procedures for lines of progression not validated, but it was also error to approve requiring applicants to pass two tests for positions where only one test was validated. Albemarle seeks to justify this under the business necessity rule. Albemarle originally hires all employees into a pool. From this pool the employees move into a line of progression as vacancies occur. Since it is not known into which line of progression an employee will be placed, Albemarle asserts there is nothing wrong with requiring all employees to be qualified for any line.

[4] Albemarle has not shown that hiring all employees into a pool is necessary to the safe and efficient operation of

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[4] The appellants also question the validity of the validation study because the employees tested were primarily from higher level, rather than entry level, positions. As pointed out by the EEOC guidelines, 29 C.F.R. § 1607.4(c)(1) (1970), such a validation technique is permissible only where new employees will progress to the higher level "within a reasonable time and in a great majority of cases." As stated by Cooper & Sobol, Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv.L.Rev. 1598, 1649 (1969):

> In addition, the problems inherent in test use are compounded by the fact that the higher level jobs may not be reached for several years, during which time an employee may improve his capabilities. This possibility seems particulalry likely in the case of an individual whose potential has been artificially suppressed through discrimination, in education and otherwise. In order for a promotability interest to justify test use, therefore, it is essential that the test have been properly evaluated and shown to be predictive of performance at some job level to which promotions can be expected in the reasonable future.

In *Griggs* the Court failed to reach the question of whether a testing procedure which takes into account higher level job requirements is permissible, 401 U.S. at 432, 91 S.Ct. 849. We likewise fail to reach this question because of insufficient evidence below as to the time in which it takes an employee to progress to higher level jobs.

its business, nor has it shown that hiring employees for specific lines of progression is not an acceptable alternative. This they were required to prove to justify their policies under the business necessity test. Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971).

Thus we hold that the district court erred in upholding the validity of the pre-employment personnel tests and in refusing to enjoin their use.

II

Back Pay

Title 42 U.S.C. § 2000e-5(g) provides in relevant part:

> The court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay . . . .

The district court found that Albemarle had practiced discriminatory employment practices and that these practices had been perpetuated through a job seniority system. Consequently, the district court enjoined Albemarle and the defendant union, Halifax Local 425, from continuing the discriminatory practices. Nevertheless, the district court, finding an award of back pay to be within his discretion, refused to award back pay to the complaining class. The reasons given by the district court for refusing such an award were that the claim for back pay was filed nearly five years after the institution of the action, and that there was no evidence of bad faith noncompliance with the Act. Neither of these is sufficient to justify the district court's refusal to award back pay.

In Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971), a case which also dealt with a seniority system which perpetuated past discriminatory practices, the defendants made the contentions presented to us here.

> The complaint filed by the plaintiffs in the District Court did not specifically request an award of back pay. . . . At a pretrial hearing concerning the appropriateness of a class action, one of the lawyers for the plaintiffs clearly indicated that the suit was one for injunctive relief rather than recovery of lost wages. It was not until well after trial of the case, though before the judge had entered a decision, that a request was made for additional relief in the form of back pay for the class.

444 F.2d at 802-803. In *Robinson*, as here:

> [B]ecause the obligation to provide back pay stems from the same source as the obligation to reform the seniority system, any general defenses relevant to the back pay award were equally relevant to the suit for injunctive relief . . . . The defendants have in no way been prejudiced by the belated claim.

444 F.2d at 803.

Other courts have held likewise. The Fifth Circuit held, in United States v. Hayes Int'l Corp., 456 F.2d 112 (1972), that the broad aims of Title VII require that the issue of back pay be fully developed and determined even though it was not raised until the post-trial stage of litigation.

Also, the Seventh Circuit, in a case which was not a class action, remanded the case in order that " 'relief should be made available to all who were so damaged whether or not they filed charges and whether or not they joined in the

suit.'" Sprogis v. United States Air Lines, Inc., 444 F.2d 1194, 1202 (7th Cir.), cert. denied, 404 U.S. 991, 92 S.Ct. 536, 30 L.Ed.2d 543 (1971).

In *Robinson* the argument was also made that back pay should not be awarded where the defendant had acted in good faith. Put negatively, the argument, urged by Albemarle, is

> that back pay should not be awarded in the absence of a specific intent to discriminate. A corollary argument is that the award was improper in light of the unsettled state of the law. The principal answer to both points is that back pay is not a penalty imposed as a sanction for moral turpitude; it is compensation for the tangible economic loss resulting from an unlawful employment practice. Under Title VII the plaintiff class is entitled to compensation for that loss, however benevolent the motives for its impostion.

444 F.2d at 804. *See also,* Johnson v. Goodyear Tire & Rubber Co., 349 F.Supp. 3, (S.D.Tex., 1972) (also a seniority case where good faith was present).

The only significant difference between *Robinson* and the present case is that in *Robinson* the district court had awarded back pay and the district court below refused to award back pay. The question then is whether, in light of the broad aims of Title VII, this court may affirm the opposite result as to back pay on similar factual situations because such award rests in the discretion of the district judge.

[5] "Discretion in a legal sense necessarily is the responsible exercise of official conscience on all the facts of a particular situation in the light of the ***purpose for which the power exists.***" Bowles v. Goebel, 151 F.2d 671, 674 (8th

Cir. 1945) (emphasis added). Thus in determining the proper scope of the exercise of discretion, the objective sought to be accomplished by the statute must be given great weight. Hecht Co. v. Bowles, 321 U.S. 321, 331, 64 S.Ct. 587, 88 L.Ed. 754 (1944). Where a district court fails to exercise discretion with an eye to the purposes of the Act, it must be reversed. Wirtz v. B. B. Saxon Co., 365 F.2d 457 (5th Cir. 1966) Shultz v. Parke, 413 F.2d 1364 (5th Cir. 1969).

"The clear purpose of Title VII is to bring an end to the proscribed discriminatory practices and to make whole, in a pecuniary fashion, those who have suffered by it." Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 720 (7th Cir. 1969). In light of the congressional purpose, courts should give "a wide scope to the act in order to remedy, as much as possible, the plight of persons who have suffered from discrimination in employment opportunities." Rowe v. General Motors Corp., 457 F.2d 348, 354 (5th Cir. 1972).

Also, as we stated in Robinson, "[t]he back pay award is not punitive in nature, but equitable—intended to restore the recipients to their rightful economic status absent the effects of the unlawful discrimination." 444 F.2d at 802. See also, Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969).

[6, 7] Because of the compensatory nature of a back pay award and the strong congressional policy embodied in Title VII, a district court must exercise its discretion as to back pay in the same manner it must exercise discretion as to attorney fees under Title II of the Civil Rights Act. *See Bowe, supra* 416 F.2d at 719. Thus, a plaintiff or a complaining class who is successful in obtaining an injunction under Title VII of the Act should ordinarily be awarded back pay unless special circumstances would render

such an award unjust.[5] Newman v. Piggie Park Enterprises, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968). *See Bowe, supra* 416 F.2d at 719-720.

[8] Because there are no such special circumstances here, on remand the district court should include an award of back pay in its order. It is to be remembered, of course, that a back pay award is limited to damages which are actually suffered. Lea v. Cone Mills Corp., 438 F.2d 86 (4th Cir. 1971).

Reversed.

Boreman, Senior Circuit Judge (concurring in part and dissenting in part):

I am in agreement with the result reached by Judge Craven in that portion of his opinion which holds that Albemarle Paper Company has failed to show a business relationship between the racially biased tests administered to prospective employees, and its personnel requirements. However, from that portion of his opinion reversing the district court's refusal to award back pay, I must respectfully dissent.

The appellants advance multiple theories in their effort to persuade this court to modify the relief granted below to include an award of back pay. The two arguments approved and adopted by Judge Craven are: first, the equation of § 706(g) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g), with § 706(k) of the Act. 42 U.S.C. § 2000e-5(k), which provides for an award of attorney's fees in the discretion of the court and under which the

[5] For examples of such special circumstances said to justify refusal of a back pay award, *see* Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002 (9th Cir., June 20, 1972); Le Blanc v. Southern Bell Tel. & Tel. Co., 333 F. Supp. 602, 610-611 (E.D.La.1971), aff'd, per curiam, 460 F.2d 1228 (5th Cir. 1972).

federal courts have held attorney's fees are to be awarded as of course,[1] in the absence of "special circumstances"; and second, that failure to grant back pay was an abuse of discretion under Robinson v. Lorillard, 444 F.2d 791 (4 Cir. 1971).

In Lea v. Cone Mills, 438 F.2d 86, 88 (4 Cir. 1971), this court, over my strenuous objections stated in dissent, extended the holding of the Supreme Court in Newman v. Piggie Park Enterprises, 390 U.S. 400, 402-403, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968), that attorney's fees should ordinarily be granted in suits under Title II of the Act,[2] to include suits under Title VII as well. A study of the relevant sections and the reasoning behind the *Newman* and *Lea* decisions reveals the fallacy of a comparison between the provision for attorney's fees and for back pay.

The pertinent provisions with respect to the allowance of attorneys' fees under Title II and Title VII are virtually identical, and each was considered by Congress as sufficiently significant to be expressed in an individual subsection.[3] However, the grant of authority to award back pay is found in a completely different subsection of Title

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[1] Lea v. Cone Mills, 438 F.2d 86, 88 (4 Cir. 1971).

[2] *Accord*, Wooten v. Moore, 400 F.2d 239, 242 (4th Cir. 1968).

[3] Title II, 42 U.S.C. § 2000a-3(b):

(b) In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person.

Title VII, 42 U.S.C. § 2000e-5(k):

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

VII, the congressional separation of these two provisions indicating an intent to treat them independently. Furthermore, the subsection in which the provision for back pay is found generally sets out the equitable remedies which the district court may utilize in fashioning relief should the complaining party prevail, indicating no congressional intent to give an award of back pay any greater presumption of appropriateness than its companion remedies.[4]

More significant, however, is the reason for which the district courts' discretion was found to be limited with respect to the award of attorney's fees to prevailing parties plaintiff. In bringing an action against an employer (or manager of a public accommodation under Title II) for discrimination in the operation of his business, the plaintiff is more than a private party litigant; he acts as a "private attorney-general" in vindicating the interests of the public, and it is this advancement of the commonweal that is the basis for allowing attorney's fees as of course.[5] Such a public purpose is not present in the more delicate task of fashioning the appropriate equitable relief to fit the peculiar fact pattern of each case, and the monetary award is intended to redress purely private inequities.[6]

I must conclude, therefore, that the award of back pay, unlike the grant of attorney's fees, is an element of affirm-

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[4] The authorities generally deal with injunctive relief as within the discretion of the district courts. *E. g.* Sprogis v. United Air Lines, 444 F.2d 1194, 1202 (7 Cir. 1971).

[5] Lea v. Cone Mills, 438 F.2d 86, 88 (4 Cir. 1971). *See* Jenkins v. United Gas Corp., 400 F.2d 28, 32 (5 Cir. 1968). Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv.L.Rev. 1109, 1254 (1971).

[6] *See*, Austin v. Reynolds Metals, 327 F. Supp. 1145, 1153 (E.D. Va.1970).

ative relief which has been entrusted to the more general discretion of the district courts.[7]

Judge Craven's opinion also apparently adopts the view that this court's decision in Robinson v. Lorillard, *supra* stands for the proposition that under facts similar to those in *Robinson,* it would be an abuse of the district court's discretion to deny a request for back pay. Such a construction misinterprets the holding in *Robinson* and the proper scope of appellate review of discretionary decisions. The burden of persuasion falls on the party attempting to show an abuse of discretion and not on the successful party below.[8] In *Robinson* the holding of this court was that the appellant company failed to show, under the factual situation before the district court, that it was an abuse of discretion *to award* back pay, not that back pay was mandated under those circumstances. The term "discretion"[9] denotes that more than one acceptable alternative is available and the choice of the most appropriate is properly left in the hands of the district courts which are more inti-

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[7] *E. g.,* Schaeffer v. San Diego Yellow Cabs, 462 F.2d 1002, 1006 (9 Cir. 1972); LeBlanc v. Southern Bell Tel. & Tel., 460 F.2d 1228, 1229 (5 Cir. 1972); United States v. Dillon Supply Co., 429 F.2d 800, 804 (4 Cir. 1970); Johnson v. Georgia Highway Express, 417 F.2d 1122, 1125 (5th Cir. 1969). Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv.L.Rev. 1109, 1265 (1971).

[8] LeBlanc v. Southern Bell Tel. & Tel., 460 F.2d 1228, 1229 (5 Cir. 1972).

[9] The Supreme Court has defined "discretion" as follows:

> The term "discretion" denotes the absence of a hard and fast rule. . . . When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result.

Langnes v. Green, 282 U.S. 531, 541, 51 S.Ct. 243, 247, 75 L.Ed. 520 (1931).

mately involved with the ambiance of the cases and the merits of each position than are the Courts of Appeal.[10]

> "'*We must keep in mind that the discretion is to be exercised by the district court and not by a court of review. This court should not substitute its discretion for that of the district court.*'" (Emphasis supplied by *Larson.*) Larson v. United States, 296 F.2d 167, 170 (8 Cir. 1961).

The first reason assigned by the district court for its refusal to award back pay—that there was no evidence of bad faith noncompliance with the Act as evidenced by the active recruitment of Negroes into the company's training program for certain skilled lines of progression as early as 1964, the company-initiated merger of some lines of progression to increase advancement opportunities and good faith attempts to validate its testing procedures[11]—is not sufficiently compelling, in and of itself, to support a denial of back pay. In *Robinson* this court made clear that the remedy of back pay is not in the nature of a punishment but is an equitable measure to restore those discriminated

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[10] United States v. Dillon Supply Co., 429 F.2d 800, 804 (4 Cir. 1970):

> The government has urged us to remand with directions to enter specific injunctive relief. After careful consideration we have concluded to deny this request. The fashioning of effective and appropriate injunctive relief depends in part on the discretion of the district court. The function of the courts of appeal is to review the relief which the district court grants in light of findings and the supporting record and to determine if there has been an abuse of discretion.

[11] In 1963 the company discontinued the use of the Bennett Mechanical Comprehension Test, which is regarded to be racially biased (See Cooper and Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv.L.Rev. 1598, 1641 n. 16 (1969)) in favor of Wonderlic A & B tests.

against to their proper economic position had the complained of actions not occurred.[12] This is not to say, however, that the good faith of the company may never be taken into account in considering and determining the proper relief to be granted.[13] Should there exist equitable factors of which the district court may properly take cognizance, and which are supportive of a decision to deny back pay, then innocence and good faith efforts on the part of the employer may be factors to be weighed in the balancing of equities.

Some insight into the proper application of that equitable balancing power may be gained from an examination of the third argument advanced by the appellants, a comparison of § 706(g) with § 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c). In the case of Phelps Dodge v. N.L.R.B., 313 U.S. 177, 61 S.Ct. 845, 85 L.Ed. 1271 (1941), which was decided under § 10(c), the Labor Board had ordered reinstatement of a discriminatorily discharged employee together with a full award of back pay, although the employee had not earned wages during the period of his lay-off. In remanding to the Board for modification in light of the principle of mitigation of damages, the Supreme Court stated:

> [T]he advantages of a simple rule must be balanced against the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment. The Board, we believe, overestimates administrative difficulties and underestimates its administrative resourcefulness. Here again we must avoid the rigidities of an either-or-rule. The remedy of back pay, it must be remembered, is entrusted to

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[12] 444 F.2d 791 at 802, 804.

[13] *See*, Schaeffer v. San Diego Yellow Cabs, 462 F.2d 1002, 1006-1007 (9 Cir. 1972).

> the Board's discretion; it is not mechanically compelled by the Act. And in applying its authority over back pay orders, the Board has not used stereotyped formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations. (313 U.S. at 198, 61 S.Ct. at 854.)

The primary factor given by the district court in the instant case was prejudice to the interests of the company arising from representations made by the appellants in their status as plaintiffs below. During the early stages of this case, the company moved for Summary Judgment and in replying to that motion,[14] the plaintiffs set out the limits of the relief sought:

> It is important to understand the exact nature of the class relief sought by plaintiffs. No money damages are sought for any member of the class not before the court, nor is specific relief in the way of job changes, promotions or the like being sought for any member of the class not before the court. The only relief sought for the class as a whole is that defendants be enjoined from treating the class as a separate group and discriminating against the class as a whole in the future....
>
> * * *
>
> [T]he matter of specific individual relief for other class members is not before this Court.

Judge Craven in the majority opinion erroneously characterizes the prayer for back pay as merely a tardy request, when as illustrated above, it in fact was a reversal of ex-

[14] The answer was filed on November 22, 1966.

press representations made three and one-half years prior to the request for additional relief.[15] This situation is plainly distinguishable from *Robinson,* in which the oral representation by counsel for the plaintiffs that no monetary relief was sought was made at pre-trial conference. The prejudice to Albemarle stemmed not from a failure of defenses, with which this court was concerned in *Robinson,* but from the unconscionably long delay between the express disclaimer and the unindicated, abrupt reversal of position.

Rule 54(c), Federal Rules of Civil Procedure, provides that the federal courts "shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings," but this is not the ordinary case of a mere failure to request a specific form of relief; here there was an express and formal disclaimer of intention to seek that particular remedy. An opposing party should be permitted to rely on such a statement, and to the extent that in relying thereon he has acted to his detriment,[16] Rule 54(c) does not mandate the grant of the contested award.[17]

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[15] The request was first communicated to the company on June 4, 1970.

[16] Illustrations of the detriment arising from the reliance of the defendants upon the express disclaimer by the plaintiffs of their intention to seek back pay for members of the class generally, were argued before the district court at pretrial conferences: (1) The extensive period of time taken for prosecution of the suit exposed the defendants to the unexpected hazard of a potentially enormous award, unavailable for consideration during their continued efforts to arrive at a settlement, and which threatened the financial viability of the defendant paper mill. (2) During the hiatus with respect to the back pay claim, the paper mill was sold by the defendant Ethyl Corp. to the defendant Hoerner-Waldorf Corp., with the transfer agreement taking express notice of the pendency of suit, a strong indication of the impact the status of that suit had upon the deliberations of the principals. (3) The inordinately long delay tended to preclude the

More importantly, Rule 54(c) is merely the vehicle by which the party is to obtain the "relief to which he is entitled." The relief and the entitlement thereto are to be determined by the district court under § 706(g), and Rule 54(c) cannot compel the grant of relief which is within the discretion of the district court. The court below did not base its refusal to award back pay on the failure to request such relief pursuant to Rule 8(a). F.R.Civ.P., but by virtue of its discretionary powers under § 706(g); the source of the claim of authority for granting the award sought is the very source relied upon by the court below to deny the request.

I do not find it possible to say that the reasons assigned by the district court in support of its decision not to award back pay show an abuse of discretion, and I would therefore affirm the decision below. Under the circumstances here I would not be willing, in any event, to go beyond a direction to the district court to investigate the propriety of awarding back pay with respect to those named plaintiffs actually before the court since the representations of the appellants in their Memorandum in Opposition to Summary Judgment explicitly indicate an intent to seek affirmative, individual monetary relief only for themselves, a relatively small group, and for no others.

ALBERT V. BRYAN, Senior Circuit Judge (dissenting in part, and concurring in part):

I would affirm the District Court's refusal to enjoin the employee testing practices of Albemarle Paper Com-

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defendants from adequately preparing a defense to individual claims, due to the impossibility or impracticality of deposing witnesses and claimants nearly five years after the occurrences of events of which plaintiffs complain.

[17] Rental Development Corp. v. Lavery, 304 F.2d 839, 842 (9 Cir. 1962).

pany. However, I would reverse for its deprival of the employees of an opportunity to recover back pay, if any, lost by reason of the practice of fixing seniority on a job instead of a plant basis.

One cannot read the District Judge's opinion without being impressed by its thoroughness, completeness and fairness. Overall, save for the disallowance of back pay just mentioned, I think the opinion honors the dictates of the Civil Rights Act of 1964 and squares with the exactions of the Act as expounded in Griggs v. Duke Power Company, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

While Judge Craven's recitation of the facts is altogether accurate, I would add this synopsis. A full appraisal of the Court's ruling calls for review of the steps taken by Albemarle to meet the statute's demands. Before the effective date of the Civil Rights Act of 1964, Albemarle commenced recruitment of black applicants from the nearby high schools for participation in the company's apprentice program. It also sought applications from among its black employees.

Following *Griggs,* Albemarle conducted validation studies of its testing requirements. To this end an acknowledged expert in such matters was retained. He gauged his study by the manual, among others, issued August 1, 1970 by the Equal Employment Opportunity Commission, entitled "Guidelines of Employee Selection Procedures." Pursuant to his directions each employee was given three well-known tests, the Wonderlic, Forms A and B, and the Beta. The tests purported to show the employee's capability to do the work assigned him. His performance was thereafter rated twice by two different supervisors, who made independent evaluations without knowledge of his test scores.

The test results and job ratings were sent to Purdue

University for statistical correlation. The District Judge found:

> "35. The results of the validation study, presented both in statistical and graphical form, showed positive correlations of a statistically significant nature for nine of the ten specific job groupings . . . ."

The expert advised that "the company utilize these tests for its initial hiring," observing, however, that "no test or set of tests will validate for all jobs." With this evidence in mind, I look to the errors ascribed in Judge Craven's opinion to the District Court's refusal to direct Albemarle to abolish or change its testing procedures.

I. First, I cannot agree that the employer did not validate the tests and relate them to the jobs in *all* the lines of skilled employment. The District Judge found otherwise, saying: "The group tested was typical of employees in the skilled lines of progression." This, for me, is a conclusion that the groups tested fairly exemplified the remaining groups and also fairly represented the qualifications existing in *all* the skilled lines. This reading of his factual findings is reinforced by his later statement: The *personnel* tests administered at the plant have undergone validation studies and *have been proven* to be job related." (Accent added.) This statement, I understand, encompasses all the groups at the plant, whether tested directly or by sample. Such a method of testing in a multiunit organization is, as noted by Judge Craven, approved by the Guidelines of Employee Selection Procedures, supra, § 1607.5.

The breadth of the expert's survey is described in his report as follows:

> "General Summary:

"Inspection of the correlations and charts shown in this report shows quite conclusively that both the Beta and Wonderlic A tests *can be reasonably used for both hiring and promotion for most of the jobs in this mill.* . . . The EEOC could not reasonably object to these standards in the light [of] the validation data covered in this report." (Accent added.)

Secondly, in view of the findings by the Court that validation studies had been applied to the personnel tests and that the tests had been proved to be job related, I cannot join in the determination that discrimination resulted from the absence of "job analyses." It seems to me that these findings necessarily recognize that the equivalent of "job analysis" was utilized. In rating the employees, the jobs' features were undeniably considered, for the supervisors were unquestionably familiar with these elements.

Thirdly, also unwarranted, it seems to me, is criticism of the District Court's acceptance of the company's practice of "requiring applicants to pass two tests for positions where only one test was validated." The two are the Beta and Wonderlic. Beta (non-language) measures merely native intelligence, while Wonderlic (verbal) tests reading ability. The District Court justifies its approval of Albemarle's utilizing both tests because it was a business necessity. The Court found that the complexity of Albemarle's newly adopted machinery made reading an absolute requirement for the safe and efficient operation of the machines and called for employees "with a high level of native intelligence." A personal inspection of the machinery revealed the intricacy to the judge.

Each of these aptitude tests is "demonstrably a reasonable measure of job performance." *Griggs*, at 436, 91 S.Ct. at 856. Thus they are their own proof of their validation. My

understanding is that a test cannot be declared discriminative if it searches for an indispensable factor of a job. *Griggs,* supra, at 431, 91 S.Ct. 849.

It does not appear from the District Judge's findings that low scores on one or both tests would bar all applicants for employment. Decisions on employment in non-technical areas are apparently not made solely upon test results, but include such considerations as experience, references and interviews.

In my judgment the District Judge, in regard to the testing requirements, exercised a cautious solicitude, both for the employees' entitlements and the employer's obligations under the Civil Rights Act of 1964. His injunction against a high school education as a job prerequisite and against the use of job seniority instead of plant seniority removed the employees' sustainable grievances. Ten days were devoted to the hearing of the case—July 26 to August 5, 1971. With this industry and application, along with the knowledge of the rigors of *Griggs,* as well as of the EEOC guidelines, the District Judge did not, to my mind, omit or deviate in any significant degree from the Act. It must be remembered, throughout, that the three items of the District Judge's determination just enumerated constitute findings of fact, and I cannot say they are clearly erroneous.

II. Lastly, recovery was asked by the plaintiffs for "the amount of pay which would have accrued to the employees had there been no unlawful practice." Under the Act, 42 U.S.C. § 2000e-5(g), back pay may be ordered in accompaniment of an injunction—and only then— against an employer who has engaged in "an unlawful employment practice" and has done so "intentionally."

As Judge Craven notes, the District Court found that "Albemarle has practiced racially discriminatory employ-

ment . . . prior to July 2, 1965 and that the effect of this discrimination had been perpetuated through a job seniority system." Accordingly the Court issued an injunction, pursuant to the Act, against the maintenance of this discrimination, terming it "an unlawful employment practice" and concluding that it had been committed "intentionally." No objection was made by the employer to this finding and conclusion, and no appeal taken from the injunctive order. Indeed, in the oral argument of the appeal the appellee-defendants conceded that the District Judge had indeed stated this conclusion on "intentionally."

For this reason I think back pay lost by an employee through the company's resort to job-seniority should be recovered. Of course, the reimbursable loss must be proved to be the direct result of the invidious practice and, as Judge Craven admonishes, the grant of monetary relief is not to exceed the "damages which are actually suffered."

Conclusion

In sum, as set for in Part I hereof, I dissent from Part I of Judge Craven's opinion; but I concur with the award, in his Part II, of back pay insofar as it is granted for loss occasioned by the job seniority practice, as explained in my Part II.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

[Title Omitted in printing]

ORDER

[Filed June 25, 1973]

Upon consideration of the petitions for rehearing, it appearing that a majority of the judges in regular active service, plus Senior Judges Boreman and Bryan, who were members of the original hearing panel, have voted to grant the petitions,

It Is Now Ordered that the petitions for rehearing *en banc* be, and they hereby are, granted. The *en banc* hearing will be scheduled by the Court.

/s/ Clement F. Haynsworth, Jr.
Chief Judge, Fourth Judicial Circuit

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-1267

Joseph P. Moody, Theodore Daniels, Henry Hill, and Arthur Mitchell,

Appellants,

versus

Albemarle Paper Company, a Virginia corporation; United Papermakers and Paperworkers, AFL-CIO, and Halifax Local No. 425, United Papermakers and Paperworkers, AFL-CIO, and Albemarle Paper Company, a Delaware corporation, Hoerner Waldorf Corporation, a Delaware corporation, First Alpaco Corporation, and Ethyl Corporation, a Virginia corporation,

Appellees.

Equal Employment Opportunity Commission,

Amicus Curiae.

No. 73-1479

Baxter K. Williams, Albemarle Employment Coordinating Community Development Association, an unincorporated association, and the North Carolina Teachers Association, a corporation,

Appellees,

versus

The Albemarle City Board of Eduaction, a public body corporate,

Appellant.

CERTIFICATE

[Filed December 5, 1973]

The Judges of the United States Court of Appeals for the Fourth Circuit, pursuant to the provisions of 28 U.S.C. § 1254(3), respectfully certify the following question to The Supreme Court of the United States:

> Under 28 U.S.C. § 16 and Rule 35 of the Federal Rules of Appellate Procedure, may a senior circuit judge, a member of the initial hearing panel, vote in the determination of the question of whether or not the case should be reheard *en banc?*

The question is of determinative importance in each of the cases.

In *Moody*, two senior circuit judges were members of the original hearing panel and participated in the decision. Upon a suggestion of a rehearing *en banc*, each voted for it. Though a majority of the judges in regular active service did not vote for an *en banc* rehearing, the votes of the two senior circuit judges were counted providing a majority of the counted votes in favor of rehearing *en banc*. On that basis, a rehearing was ordered and held, the two senior judges participating in the hearing as provided in 28 U.S.C. § 46. If the *en banc* court reaches the merits, the tentative vote is that it will modify the panel decision with respect to an award of back pay.

In *Williams*, one senior circuit judge was a member of the initial hearing panel. Upon a suggestion of a rehearing *en banc*, he is opposed. A majority of the judges in regular active service is in favor of an *en banc* rehearing, but if the vote of the senior circuit judge is counted, the suggestion will fail by an equal divison of the judges. No formal order has been entered on the petition for rehearing with a suggestion for rehearing *en banc*, because the question of the right of the senior circuit judge to vote arose. The panel had reversed an award of damages by the district court,

but if the voting on the petition for rehearing is an accurate prediction, the *en banc* court, if it reaches the merits of the appeal, probably would affirm the district court by an equally divided court.

In the Court of Appeals for the Fourth Circuit, the custom has been to count the votes of senior circuit judges who were members of the intial hearing panel when the court was polled on the question of *en banc* rehearing. This was thought reasonable since the voting senior circuit judge would be a member of the *en banc* court if rehearing were granted. In earlier cases, however, the vote of the senior circuit judge or judges was not crucial. The fact that it is crucial in these two cases occasioned a close examination of the statute and the rule, and a look at *Zahn* v. *International Paper Co.*, 2 Cir., 469 F.2d 1033, 1040-42, and *Allen* v. *Johnson*, 5 Cir., 391 F.2d 527, 532.

Were the answer to the question in each case of importance to the litigants only, the Judges of the Court of Appeals for the Fourth Circuit, sitting *en banc*, could decide it, though in *Williams* v. *The Albemarle City Board of Education*, there is a possibility of an equal division of the court. The question, however, involves more than the rights of the litigants, for the duties and responsibilities of some of the judges of the court are in issue and relative powers of participation are at stake.

The execution of this Certificate has been authorized by the two senior circuit judges and by all of the judges in regular active service.

/s/ Clement F. Haynsworth, Jr.
Chief Judge, Fourth Judicial Circuit

SUPREME COURT OF THE UNITED STATES

JOSEPH P. MOODY ET AL. *v.* ALBEMARLE PAPER COMPANY ET AL., and WILLIAMS *v.* ALBEMARLE CITY BOARD OF EDUCATION

ON CERTIFICATE FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 73-899. Decided June 17, 1974

PER CURIAM.

Appeals from the judgments of the trial courts in these two cases were heard and determined by two separate three-judge divisions of the Court of Appeals for the Fourth Circuit. Sitting by designation as members of each of the divisions were senior judges of the Fourth Circuit.[1] Following decisions by both divisions, the unsuccessful parties petitioned for rehearings in banc pursuant to 28 U. S. C. § 46 (c):[2]

> "Cases and controversies shall be heard and determined by a court or division of not more than three

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[1] The Court of Appeals for the Fourth Circuit is composed of seven judges in regular active service, 28 U. S. C. § 44, and two judges who have retired from that service but remain available for duties as designated and assigned, known as senior judges. 28 U. S. C. § 294 (b). In *Moody*, both of those senior judges were designated members of the three-judge division which originally decided that appeal; in *Williams*, one of the senior judges was so designated. 28 U. S. C. § 294 (c).

[2] Fed. Rule App. Proc. 35 provides in part:

"(a) *When Hearing or Rehearing In Banc Will Be Ordered.* A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the Court of Appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain

judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit *who are in regular active service.* A court in banc shall consist of all circuit judges in regular active service. A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court in banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof." (Emphasis added.)

It had been the practice of the Fourth Circuit to count the votes of their senior judges who were members of the original hearing division when the court acted on the question whether to order a rehearing in banc. In those cases, however, the votes of the senior judges were not crucial. Certificate, at 3. Here, their votes are crucial. In *Moody*, while a "majority of the circuit judges of the circuit who are in regular active service" did not vote for a rehearing in banc, the two senior judges who sat on the division by designation did so vote; their votes, if counted, would make a majority for rehearing. In *Williams*, while a majority of circuit judges in regular active service did vote for a rehearing in banc, the senior judge who sat on the original division by designation voted against rehearing; with his vote counted the rehearing would fail by an equal division of those voting.

Accordingly, all Circuit judges of the Fourth Circuit in regular active service and both senior judges of the

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uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

"(b) *Suggestion of a Party for Hearing or Rehearing In Banc.* The clerk shall transmit any such suggestion to the judges of the court who are in regular active service but a vote will not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party."

Circuit have, pursuant to 28 U. S. C. § 1254 (3), certified to us the question whether a senior judge of the circuit who was a member of the original division hearing a case may vote to determine whether the case should be reheard in banc. Because of the importance of the question to the administration of judicial business in the Circuits, as well as to the parties in the two cases pending in the Fourth Circuit, we granted leave to and invited those parties to file briefs in response to the question certified. Upon consideration of the question and the briefs filed by the litigants on both sides of both pending cases, we conclude that the answer should be in the negative; senior circuit judges who are members of the originally assigned division hearing a case are not authorized by Congress to participate in the determination whether to rehear that case in banc.

The power of courts of appeals to hear or rehear cases in banc was first determined in *Textile Mills Corp.* v. *Commissioner*, 314 U. S. 326 (1941). In 1948, Congress provided legislative ratification of *Textile Mills* by enacting subsection 46 (c) of the Judicial Code, which then provided that hearings or rehearings before courts of appeals in banc were to be

> "ordered by a majority of the circuit judges of the circuit *who are in active service.* A court in banc shall consist of all active circuit judges of the circuit." Act of June 25, 1948, c. 646, 62 Stat. 871. (Emphasis added.)

In *Western Pacific R. Corp.* v. *Western Pacific R. Co.*, 345 U. S. 247 (1953), the Court had occasion to construe the 1948 statute, and determined that it was a grant of power to the courts of appeals to order hearings or rehearings in banc, not the creation of a right in litigants to compel such hearings or rehearings or even to compel the court to vote on the question of hearing or rehearing. The Court also addressed itself to the procedure govern-

ing the exercise of this power, holding that each court of appeals was "left free to devise its own administrative machinery to provide the means whereby a majority may order such a hearing." [3] 345 U. S., at 250. This discretion has been subsequently confirmed. *Shenker* v. *Baltimore & Ohio R. Co.*, 374 U. S. 1, 5 (1963); *United States* v. *American-Foreign S. S. Corp.*, 363 U. S. 685, 688 (1960).

In one of these latter cases, *American-Foreign*, a question arose under the language of the 1948 statute whether, if rehearing in banc was voted, senior judges were eligible to participate in the decision of that case on the merits. The Court held that senior judges were not eligible to sit. Congress in 1963 then enacted the present version of subsection 46 (c), which provides that a senior judge who sat on the original division hearing a case is "competent *to sit* as a judge of the court in banc" in the merits rehearing of the case. (Emphasis added.) But the language of the statute concerning how the court *orders* a rehearing in banc was not changed, except to reinforce the limitation on the grant of power by adding "regular" before "active service," sharpening the definition of which judges may participate in ordering a hearing or rehearing in banc.

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[3] The machinery devised by the Ninth Circuit in that case was one which governed the initiation of the polling of the court to determine whether it should hear or rehear a case in banc. Although there was some uncertainty whether indeed the Ninth Circuit had provided such machinery, 345 U. S., at 263, its nature was to delegate to the three-judge division first hearing the case the power to initiate a poll of the court. *Id.*, at 259. Two of the judges who were members of the division in that case were district judges. *Id.*, at 263. This machinery was similar in kind to that now set forth in Fed. Rule App. Proc. 35 (b), *supra*, n. 2, by which a vote to hear or rehear a case in banc will not be taken unless such a vote is requested by a judge in regular active service, or a judge who was a member of the division that rendered a decision sought to be reheard.

The language of the present statute thus confines the power to order a rehearing in banc to those circuit judges who are in "regular active service." Although, as the Court has held, those judges are largely free to devise whatever procedures they choose to initiate the process of decision to order such a rehearing, and to decide who may participate in those preliminary procedures, see n. 3, *supra*, neither the Court nor Congress has suggested that any other than a regular active service judge is eligible to participate in the making of the decision whether to hear or rehear a case in banc. Obviously such a decision can be reached only by voting. As revealed by the decisional and statutory evolution of the institution of the in banc court, the eligibility of senior judges for participation therein has been the exception, not the rule. We are not at liberty to engraft upon the statute a meaning inconsistent with its historical limitations.

Indeed, the very purpose of the in banc court supports our conclusion that senior judges have not been authorized by implication to participate in ordering a hearing or rehearing in banc. As the Federal Rule indicates, *supra*, n. 2, the in banc court is normally reserved for questions of exceptional importance, or to secure or maintain uniformity of decision within the Circuit. In the wise use of this exceptional power to "determine the major doctrinal trends of the future" for a particular circuit, *American-Foreign*, *supra*, 363 U. S., at 690, Congress appears to have contemplated the need for an intimate and current working knowledge of, among other things, the decisions of the circuit, its pending cases, and the magnitude and nature of its future workload. Senior judges provide a judicial resource of extraordinary value by their willingness to undertake important assignments "without economic incentive of any kind." *Id.*, at 688 n. 4. Consistent therewith, Congress has provided that when a senior judge has participated in the original division hearing, such senior judge may later sit on an

in banc court rehearing that case; this was the purpose of the 1963 amendment to the Judicial Code. But voting *on the merits* of an in banc case is quite different from voting *whether to rehear* a case in banc, which is essentially a policy decision of judicial administration. Congress vested this latter authority and responsibility exclusively in "circuit judges of the circuit who are in regular active service." 28 U. S. C. § 46 (c); because of their different nature, we cannot assume the grant of authority to do one includes authority to do the other.

The question certified to us is therefore answered in the negative.[4]

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

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[4] The only other courts of appeals which have discussed the issue have ruled similarly. *Zahn* v. *International Paper Co.*, 469 F. 2d 1033, 1040–1042 (CA2 1972) (statements and dissent upon denial of rehearing in banc); *Allen* v. *Johnson*, 391 F. 2d 527, 532 (CA5 1968) (in banc).

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-1267

Joseph P. Moody, et al.,

Appellants,

v.

Albemarle Paper Company, et al.,

Appellees.

ORDER
Filed July 22, 1974

It appearing from the decision of the Supreme Court in Moody v. Albemarle Paper Co., ... U.S. ....., 42 L.W. 3689 (June 17, 1974) (per curiam), that the order heretofore entered on June 25, 1973, setting this case for rehearing in banc, was improvidently entered, in that only active circuit judges were entitled to vote in the poll on the suggestion for rehearing in banc and a majority of the active circuit judges voted against rehearing in banc;

Accordingly, it is ORDERED that said order of June 25, 1973 be, and it is hereby, rescinded, and the petitions for rehearing and rehearing in banc be, and they are hereby, denied.

/s/ Clement F. Haynsworth, Jr.
Chief Judge

FILED
OCT 7 1974
MICHAEL RODAK, JR., CLE

In The

Supreme Court of the United States

October Term, 1974

No. 74-389

ALBEMARLE PAPER COMPANY, ET AL.,
Petitioners,

v.

JOSEPH P. MOODY, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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In The

Supreme Court of the United States

October Term, 1974

No. .....

ALBEMARLE PAPER COMPANY, ET AL.,
Petitioners,

v.

JOSEPH P. MOODY, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioners, Albemarle Paper Company (a Virginia corporation), Ethyl Corporation (a Virginia corporation), Albemarle Paper Company (a Delaware corporation) and Hoerner Waldorf Corporation (a Delaware corporation) respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on February 20, 1973.

OPINIONS BELOW

The final opinion and order of the District Court for the Eastern District of North Carolina (App. A of Petition) is reported at 4 FEP Cases 561. The opinion of the

United States Court of Appeals for the Fourth Circuit (App. B of Petition) is reported at 474 F.2d 134.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on February 20, 1973. A timely petition for rehearing *en banc* was granted on June 25, 1973. After briefing to and oral argument before the *en banc* court, a question of appellate procedure was certified to this Court by the Court of Appeals on December 6, 1973. The opinion of this Court on the question certified was delivered on June 17, 1974. Pursuant thereto, the Court of Appeals, on July 22, 1974, vacated its earlier order granting the petition for rehearing *en banc* and denied Petitioner's petition for rehearing. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether this Court should resolve a conflict among the Circuits as to whether, in cases under Title VII of the Civil Rights Act of 1964, the District Courts have traditional equitable discretion to determine whether back pay is an appropriate remedy.

2. Whether a class action for back pay under Rule 23 of the Federal Rules of Civil Procedure is inherently inconsistent with the Congressional intent behind the remedial provisions of Title VII, particularly as to class members who did not file a prior written complaint with the Equal Employment Opportunity Commission.

3. Whether the decision below misconstrues this Court's decision in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, in a manner which effectively precludes the use of job-validated

employment testing and nullifies the Congressional intent reflected in 42 U.S.C. § 2000e-2(h).

4. Whether the decision below, in ordering the entry of specific injunctive relief against Petitioners' use of testing, improperly usurps the power of the District Court on remand.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions, 42 U.S.C. § 2000e-2(a), 42 U.S.C. § 2000e-2(e), 42 U.S.C. § 2000e-5(g) and 42 U.S.C. § 2000e-2(h), are set out in Appendix C. The Equal Employment Opportunity Commission ("EEOC") guidelines on employee selection procedures appear at 29 CFR § 1607.

STATEMENT OF THE CASE

On August 25, 1966,[1] four black employees of Petitioner's Roanoke Rapids, North Carolina pulp and paper mill brought this private class action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000-e *et seq.*, ("Title VII") against Albemarle Paper Company ("Albemarle-Virginia"), a Virginia corporation[2] and Halifax

[1] The employer was first advised of the fact that it had been charged with discriminatory conduct on August 11, 1966, at which time it was served with the Respondents' charges and was given until August 26, 1966, to respond to the charges. Thus, the complaint herein was filed, pursuant to then applicable procedural requirements, before the employer was afforded any opportunity for conciliation.

[2] Albemarle-Virginia is a subsidiary of Ethyl Corporation. In 1968 the assets of Albemarle-Virginia were sold to Albemarle Paper Company ("Albemarle-Delaware"), a Delaware corporation and a subsidiary of Hoerner Waldorf Corporation. Ethyl Corporation, Albemarle-Delaware and Hoerner Waldorf Corporation were added as parties defendant in 1970. The interests of the corporate defendants coincide on the issues raised herein and they are jointly referred to as "Petitioners." For convenience, the term "Petitioner" is used in referring to the employer of Respondents.

Local No. 425, United Papermakers and Paperworkers, AFL-CIO (the "Union"). The complaint alleged various racially discriminatory practices at the mill, including the implementation of a discriminatory seniority system embodied in the collective bargaining agreement. Over Petitioner's objection, Respondents were allowed to proceed as representatives of a broad class of black employees who did not file written complaints with the EEOC prior to commencement of this action. 271 F.Supp 27.

The Roanoke Rapids mill commenced operations in 1907, but it was not until the 1950's that mechanization and the addition of modern paper machines converted the facility into a sophisticated and complex paper mill. Like all paper mills, the Roanoke Rapids mill has been organized on a departmental basis,[3] and the seniority provisions of Petitioner's collective bargaining agreements with the Union have reflected this departmental structure.

Modernization of the Roanoke Rapids mill created the need for a more highly skilled work force. To meet this need, in about 1956, Petitioner instituted a personnel screening program for use in the selection of employees for jobs created by the installation of new machinery. As part of this program, Petitioner made successful completion of certain ability tests a prerequisite for entry into certain skilled lines of progression.[4]

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[3] Each department is organized into one or more lines of progression into which employees can enter and move up into more demanding jobs as vacancies occur, on the basis of seniority, ability and experience. Entry into a departmental line of progression is generally from the Extra Board, introduced for the purpose of maintaining a reservoir of employees who would be available to staff entry level jobs in the various lines of progression.

[4] The Revised Beta test, a professionally developed non-verbal test designed to measure the intelligence of illiterates, was adopted in 1956. Thereafter, in 1963, Petitioner also began using as a requirement for entry into certain skilled lines of progression the Wonderlic test, Series A and B, professionally developed and widely used tests of verbal skills.

Since the passage of Title VII, Petitioner has taken many steps to insure that its employment practices comply with federal law. Among other things, significant changes were made in the seniority system embodied in Petitioner's collective bargaining agreement. In the 1968 contract, Petitioner and the Union eliminated rigid departmental seniority and adopted a form of plant-wide seniority.[5] Then, in 1971, prior to trial, Petitioner and the Union advised the District Court that they had no objection to the entry of a decree permitting black employees to use "plant seniority" for the purpose of advancement. The substance of the proffered decree was adopted by the District Court.

Petitioner also took steps to insure that its use of tests was in conformity with the law. After this Court's decision in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), Petitioner retained an expert to conduct a validation study. This study showed a positive correlation between test results and performance on the job.[6]

Until 1970 this action was one seeking exclusively class-wide injunctive relief, with Respondents having expressly abandoned any claim for class-wide back pay in order to insure qualification of the case as a class action. Nevertheless, in 1970 Respondents asserted that they were in

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[5] The 1968 contract afforded a transferring employee seniority in the new department equal to that held in his last job. The 1968 contract also granted "red circle rates," whereby a transferring employee would be entitled to the pay rate of the job from which he transferred until he moved high enough in the new line of progression to reach an equal pay level.

[6] The study was conducted by use of the "concurrent validation" method. Petitioner's expert selected, on the basis of his analysis and knowledge of the nature and content of the jobs, ten skill-related job groupings as typical of jobs in the skilled lines of progression. Each employee in each group was rated in comparison with each other employee in the group to obtain a ranking of job performance and statistical correlation was performed to determine correlation between job performance and test results.

fact seeking both injunctive and back pay relief on behalf of the class.

After trial in July and August 1971, the District Court issued its Memorandum Opinion and Order. The District Court entered a decree providing for the type of modification of the seniority system which had been consented to by Petitioner prior to trial.

But the District Court rejected the charge that Petitioner's use of the Revised Beta and Wonderlic tests in certain skilled lines of progression violated Title VII,[7] and the District Court, expressly exercising its discretion as to the appropriate remedy, ruled that the members of the Respondent class were not entitled to back pay.

A panel consisting of two senior judges (Bryan, J. and Boreman, J.) and one regular judge (Craven, J.) reversed the District Court on both the testing and back pay issues. As to each issue, the decision was divided, with a different combination of the panel providing the necessary 2-1 majority. Thus, two circuit court judges held that Petitioner had violated Title VII by using the tests, and a different majority also reversed the District Court in its denial of back pay.

Following the panel's decision, the Fourth Circuit granted Petitioner's request for a rehearing *en banc*. Supplemental briefs were filed by the parties and oral argument was held before the *en banc* court. Thereafter, upon certification of the question by the Fourth Circuit, this Court held that the two senior judges who were members of the initial panel could not properly vote to grant rehearing *en banc*. There-

[7] The District Court also found that, since "the personnel tests alone are adequate to measure the mental ability and reading skills required for job classification," the high school education requirement was non-essential and would be prohibited. It should be noted, however, that this requirement had been waived since 1965 as to all incumbent employees hired prior to July 2, 1965.

after, the Fourth Circuit vacated its order granting the rehearing, thereby reinstating the divided decision of the original three-judge panel.

REASONS FOR GRANTING THE WRIT

The Decision Below Regarding Back Pay Conflicts With The Decisions Of Other Courts Of Appeals, And Raises Critical Questions Concerning The Remedial Provisions Of Title VII.

Title VII provides that if the District Court finds that an employer has intentionally engaged in an unlawful employment practice, it "may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay." Section 706(g), 42 U.S.C. § 2000e-5(g). This case presents fundamental questions concerning the back pay remedy, as to which there has been a conflicting array of decisions by the various Courts of Appeals.

1. The grant of remedial authority in Section 706(g) is inherently equitable in nature and the question of back pay is expressly left to the discretion of the district court. The statutory directive is that the district court, upon finding a Title VII violation "*may* enjoin the . . . practice, and order such affirmative relief as *may* be appropriate, which *may* include . . . reinstatement . . . *with or without back pay.*"

In distinguishing between Title VII and Title VIII actions on the question whether a jury trial is mandatory, this Court has observed that, "In Title VII cases, also, the courts have relied on the fact that the decision whether to award back pay is committed to the discretion of the trial judge." *Curtis* v. *Loether,* 39 L.Ed. 260, 268 (1974). Peti-

tioner submits that this observation is the only correct interpretation of the Congressional intent underlying Section 706(g).

The decision below virtually eliminates the trial court's discretion to fashion appropriate relief under Section 706(g), for the Fourth Circuit panel held that a District Court must award back pay "unless special circumstances would render such an award unjust."[8]

Other Circuit Court decisions have applied a conflicting standard, affirming trial court back pay denials in the absence of an abuse of discretion measured by traditional equitable standards. *See Manning* v. *International Union,* 466 F.2d 812, 816 (6th Cir. 1972), *cert. denied,* 410 U.S. 946 (1973); *Schaeffer* v. *Yellow Cabs, Inc.,* 462 F.2d 1002, 1006-1008 (9th Cir. 1972); *U. S.* v. *N. L. Industries, Inc.,* 479 F.2d 354 (8th Cir. 1973). And the Third Circuit in *Kober* v. *Westinghouse Elec. Corp.,* 480 F.2d 240, 246-47 (3rd Cir. 1973), recently considered both lines of cases and expressly rejected the Fourth Circuit's "special circumstances" rule.[9]

The "special circumstances" rule derives from *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U.S. 400 (1968),

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[8] A panel of the Fifth Circuit has since adopted the "special circumstances" standard in *Pettway* v. *American Cast Iron Pipe Co.,* 494 F.2d 211, 252-253 (1974), which appears to be the only other case where a *discretionary* denial of back pay was reversed on appeal. Similarly restrictive standards were set forth in *Head* v. *Timken Roller Bearing Co.,* 486 F.2d 870, 876 (6th Cir. 1973) (only "exceptional circumstances" warrant back pay denial); and in *Johnson* v. *Goodyear Tire & Rubber Co.,* 491 F.2d 1364, 1375 (5th Cir. 1974) (plaintiffs "presumptively entitled" to back pay).

[9] There is also evidence of a conflict within the Fourth Circuit. In its prior certification to this Court in this proceeding the Fourth Circuit stated:

> "If the *en banc* court reaches the merits, the tentative vote is that it will modify the panel decision with respect to an award of back pay."

dealing with the grant of attorneys' fees to successful plaintiffs in Title II cases. However, far more complex equitable factors affect the question whether back pay is an appropriate remedy in a Title VII action. *See, e.g., United States* v. *St. Louis & S.F. Ry.*, 464 F.2d 301, 311 (8th Cir. 1972), *cert. denied*, 409 U.S. 1116 (1973); *United States* v. *United States Steel Corp.*, 371 F. Supp. 1045 (N.D. Ala. 1973). And a rule which makes an award of back pay flow almost automatically from any finding of an unlawful employment practice is likely to inhibit conciliation and to discourage the prompt resolution of disputes through the entry of injunctive relief by consent (as occurred with respect to the seniority issues in this case), all in contravention of the basic policies underlying Title VII.

The question of when back pay should be awarded in Title VII actions is of widespread and compelling significance. Ignoring the plain language of Section 706(g), the Fourth Circuit has sharply curtailed the discretionary power of the District Court to fashion appropriate relief. The circuits are in conflict and this important issue should be resolved by this Court.

2. The extent to which the decision below emasculates the District Court's remedial discretion in Title VII cases is graphically illustrated by the manner in which the panel majority categorically rejected the special circumstances found by the Distrit Court to justify the denial of back pay. First, the Fourth Circuit panel ruled that Petitioner's good faith was totally irrelevant to the question of back pay. While no court has apparently denied back pay solely because of defendant's good faith, a number of courts have relied upon defendant's good faith as a relevant factor in denying back pay. *See Kober* v. *Westinghouse Elec. Corp., supra; United States* v. *St. Louis & S.F. Ry., supra; United States* v. *N. L. Industries, Inc., supra.*

Second, the Fourth Circuit panel rejected the District Court's finding that Petitioner was prejudiced by Respondents' tardy claim for back pay, which came four years after the action was commenced, and after the Roanoke Rapids mill had been acquired by Albemarle-Delaware on the assumption that this action only involved a claim for injunctive relief.[10] The panel majority reasoned that the Petitioner's defenses are the same whether or not back pay is an issue. But that overlooks the real prejudice to Petitioner. Had Petitioner been put on notice that back pay claims were involved, it may not have allowed Respondents to delay more than five years in bringing this case on for trial, thereby compounding its back pay exposure. Further, had Respondents made known their back pay claims in a timely manner, Petitioner and the Union could have sought court sanction for the changes they voluntarily and unilaterally made in the seniority system in 1968, so as to limit their potential back pay exposure. Finally, Petitioner is clearly prejudiced if back pay is allowed to the entire class after Respondents had earlier used the absence of such claims as justification for allowing the litigation to proceed as a class action. In this situation, even if the "special circumstances" rule is generally appropriate, the District Court was well

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[10] It was not merely that this issue had not specifically been raised. Rather, Respondents had specifically and categorically represented that they were not seeking back pay. In an effort to defeat Petitioner's motion to dismiss the class claims and for summary judgment (an effort which was successful), Respondents represented:

> "It is important to understand the exact nature of the class relief being sought by Plaintiffs. No money damages are sought for any member of the class not before the Courts nor is specific relief sought for any member of the class not before the Court. The only relief sought for the class as a whole is that defendants be enjoined from treating the class as a separate group and discriminating against the class as a whole in the future."

within its discretion in denying Respondents' tardy claim for back pay, and the Fourth Circuit panel exceeded the proper scope of appellate review in substituting its own judgment for that of the trier of facts.

3. The decision below is one of a number of recent lower court cases which could be read to authorize class-wide back pay in Title VII actions where some members of the class did not file a charge with the EEOC prior to commencement of the lawsuit. *See, e.g., Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d at 256-258.

The EEOC complaint and conciliation procedures built into Title VII were an integral part of the legislative compromise which led to the passage of the Civil Rights Act of 1964. After Federal Rule 23 was liberalized in 1966, the lower courts rather quickly reached a concensus that class actions seeking injunctive relief are appropriate under Title VII. Such a decision has relatively little impact, since injunctive relief in favor of the individual plaintiff normally will benefit all members of the class whether or not they are parties to the lawsuit. For example, Petitioner had little reason to be concerned on appeal with the District Court's preliminary order overruling Petitioner's objection to the class action, since the District Court ultimately denied back pay relief.

A class action for back pay, however, is quite another matter, both because of its economic impact on the defendant, and because of the administrative burdens it places on a federal court, which must process untold numbers of individual monetary claims without the assistance of the EEOC complaint and conciliation procedures. This Court should grant certiorari to review whether a class action for back pay under modern Rule 23 is inherently inconsistent with the Congressional intent behind the remedial provisions of Title VII.

The Decision Below Regarding Testing Misconstrues Griggs In A Manner Which Effectively Precludes The Use Of Job Validated Employment Testing And Nullifies The Congressional Intent Reflected In 42 U.S.C. § 2000e-2(h).

In *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), this Court held that the use of a testing or measuring device as a controlling force in employment or promotion violates Title VII if the device disqualifies blacks at a substantially higher rate, unless it is established that the test is "demonstrably a reasonable measure of job performance." This Court recognized that the use of suitably job-related tests was expressly sanctioned by Congress in Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h).

In *Griggs,* the employer had made no effort to "validate" its testing and educational requirements in accordance with professionally accepted methods of measuring the correlation between test results and job performance. On the other hand, Petitioner, following this Court's decision in *Griggs,* and in order to demonstrate that its tests did accurately measure job performance, retained a nationally recognized expert in the field of industrial psychology, who conducted a validation study[11] of Petitioner's tests.

Approving the validation procedures adopted by Petitioner's expert, and noting that the study results showed "positive correlations of a statistically significant nature," the District Court found "that both the Beta and Wonderlic A tests can be reasonably used for both hiring and promotion for most of the jobs in this mill." (A. 18) The District Court also concluded that "[t]he defendants have carried the burden of proof in proving that these tests 'are necessary for the safe and efficient operation of the business' and are, therefore, permitted by the Act." (A. 24)

[11] The procedures employed in the validation study were summarized in the District Court's opinion, A. 17, 18.

The three judge panel of the Fourth Circuit, with one strong dissent, held that the District Court "erred in upholding the validity of the pre-employment tests and in refusing to enjoin their use," relying on the failure to include in Petitioner's validation study "some form of job analysis resulting in specific and objective criteria for supervisory ratings," as supposedly required by the EEOC testing guidelines, 29 C.F.R. § 1607. The Circuit Court's decision thus raises a fundamental question as to the proper application of Section 703(h) and this Court's decision in *Griggs*.

While this Court in *Griggs* endorsed the EEOC guidelines as "expressing the will of Congress," 401 U.S. at 434, the Fourth Circuit majority's requirement of detailed and rigid compliance with the EEOC criteria for validation studies is inconsistent with this Court's recent decision in *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86 (1973). Likewise, the decision below conflicts with decisions in other Circuits which have refused to require compliance with each technical form of validation procedure set out in the guidelines. *United States* v. *Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973);[12] *Castro* v. *Beecher*, 459 F.2d 725 (1st Cir. 1972).

Test validation is a professional exercise in statistical prediction. Perfection is inherently unattainable, and the practical realities of a particular employment setting must inevitably dictate the precise validation technique to be used. Thus, it is unrealistic to read the detailed and technical EEOC guidelines as establishing a mechanical structure which all validation efforts must satisfy. The ultimate result of the decision below would surely be to deny employers a realistic opportunity to establish that their tests are "de-

[12] The Fifth Circuit has since suggested, in dictum, that the guidelines had been found to be mandatory in the *Georgia Power* case. *Pettway* v. *American Cast Iron Pipe Co.*, *supra*.

monstrably a reasonable measure of job performance." Such a result would render Section 703(h) a nullity and frustrate the intent of Congress and of this Court's decision in *Griggs*.

The Decision Below Improperly Usurps The Power Of The District Court On Remand.

The decision below includes a directive that the District Court enjoin Petitioner's use of its tests. Given the nature of the Fourth Circuit's ruling, this is an intrusion on the proper function of the District Court. The Fourth Circuit did not hold that Petitioner's tests were not job related or that the tests could not be validated. It held only that the prior attempt at validation was procedurally inadequate. Even if that ruling was correct, it does not follow that Petitioner cannot ultimately rebut the *prima facie* case of discrimination by properly validating the tests. Compare *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).

Under these circumstances, the Court of Appeals should have remanded to the District Court as was done in *United States* v. *Georgia Power Co., supra.* The court therein noted:

> "[S]tandards for testing validity comprise a new and complicated area of the law. While the Hite Study did not demonstrate compliance with the Act, we hesitate to penalize this litigant, the first to confront such a demanding burden of proof, for failing to introduce a more rigorous study. Had our standards been articulated at the time of trial, it may be that the company could have proven its compliance. Therefore, rather than now proscribing the testing program which Georgia Power has used, we remand this phase of the case to the trial court with directions to permit the company a reasonably prompt opportunity to validate

> the testing program applied to the plaintiffs, in accordance with the principles enunciated in this opinion." 474 F.2d at 917-18.

The question on remand should be whether the equities favor an immediate injunction against Petitioner's use of tests, which carries all the ramifications of a finding of discrimination, or favor further proceedings designed to determine whether the possible deficiencies in the validation study could be corrected. This is a question of potentially great importance which the Court of Appeals should have left in the first instance to the discretion of the District Court. *Cf. Neely* v. *Martin K. Eby Constr. Co.*, 386 U.S. 317 (1967); *Byrd* v. *Blue Ridge Rural Elec. Corp.*, 356 U.S. 525 (1958).

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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October 7, 1974

CERTIFICATE OF SERVICE

I, Francis V. Lowden, Jr., counsel for the Petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served all parties required to be served by depositing three copies of the foregoing Petition for Writ of Certiorari in the United States Mail, first class postage prepaid, this 7th day of October, 1974, addressed to: Jack Greenberg, Esq., 10 Columbus Circle, New York, New York 10019; J. Levonne Chambers, Esq., East Independence Plaza, 951 S. Independence Blvd., Charlotte, North Carolina; Thomas T. Clayton, Esq., 307 W. Franklin St., P. O. Box 236, Warrenton, North Carolina; Conrad O. Pearson, Esq., 203½ E. Chapel Hill Street, P. O. Box 1428, Durham, North Carolina; Warren Woods, Esq., Wilson, Woods & Villalon, Suite 1032, Pennsylvania Building, Pennsylvania Avenue & 13th Street, Washington, D. C. 20004; William K. Slate, II, Clerk, United States Court of Appeals for the Fourth Circuit, Richmond, Virginia 23219.

FRANCIS V. LOWDEN, JR.
Counsel for Petitioner

APPENDIX A

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

APPENDIX A

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

DUPREE, District Judge:—Plaintiffs brought this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., on their own behalf and on behalf of other Negroes similarly situated, alleging violations by their employer and their local union of their rights to equal employment opportunities. Jurisdiction is vested in this court by the Act and by 28 U.S.C. § 1343.

The named plaintiffs are citizens of the United States and of the State of North Carolina, residing in Halifax County, North Carolina. On July 15, 1971, this court entered an order allowing the action to be prosecuted as a class action under Rule 23 of the Federal Rules of Civil Procedure, and the class was defined as (1) all Negroes employed at the Roanoke Rapids plant of Albemarle Paper Company as of June 30, 1967; (2) all Negroes employed at said plant after June 30, 1967, except those whose initial permanent positions were not job classifications limited to, or predominantly staffed by Negroes; and (3) all Negroes who may hereafter apply for or be employed at said Roanoke Rapids plant who may be affected by the alleged racially-discriminatory employment practices of the defendants.

The alleged discriminatory employment practices have occurred at a pulp and paper plant in Roanoke Rapids, North Carolina. The multitude of defendants is explained by changes in the corporate ownership of the plant which have occurred since the institution of this action more than five years ago. However, the operation at Roanoke Rapids has at all pertinent times been called the Albemarle Paper Company and, therefore, for purposes of discussion, unless

clarity otherwise dictates, such operation will be referred to as "Albemarle."

The action encompasses all aspects of the hiring and promotion practices within the Roanoke Rapids facility and the application of the provisions of the collective bargaining agreements entered into by it with the defendant Union. The essential issues relate to the educational and testing requirements for employment and promotion utilized at the plant and the effects of the "job seniority" system embodied in the respective union contracts.

This cause was tried by this court without a jury, and having considered the evidence, briefs, oral arguments and the voluminous five-year accumulation of pleadings and other court papers, the court makes the following

Findings of Fact

1. On May 9, 1966 the named plaintiffs filed charges against Albemarle, Halifax Local No. 425 and United Papermakers and Paperworkers, AFL-CIO (United Papermakers) before the Equal Employment Opportunity Commission (EEOC) pursuant to the provisions of Section 706(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(a). These charges raised the issues set forth in the complaint filed with this court.

2. Plaintiffs received letters dated July 28, 1966 from EEOC notifying them that they were entitled to file suit in federal district court under Title VII of the Act. The complaint in this action was timely filed on August 25, 1966.

3. The paper mill was built in 1907 and it began business under the name of Halifax Paper Company. In 1937 a Virginia corporation, Albemarle Paper Company, acquired the

plant. Albemarle Paper Company (Virginia), a wholly owned subsidiary of the defendant Ethyl Corporation, operated the plant at the time this action was filed. On October 31, 1968, the paper mill was transferred to defendant Albemarle Paper Company, a Delaware corporation. Albemarle Paper Company (Delaware) is a wholly owned subsidiary of defendant Hoerner Waldorf Corporation, a Delaware corporation. Albemarle's (Virginia) name was changed to First Alpaco Corporation and thereafter was merged into defendant Ethyl Corporation.

4. There has been a continuation of the business in substantially the same manner in which the business was operated prior to the transfer on October 31, 1968; the plant location is the same; the work force is substantially the same; the jobs and working conditions are substantially the same; the method of production is substantially the same; the products and services provided are substantially the same; and the machinery and equipment are substantially the same.

5. Albemarle is a leading employer in the Roanoke Rapids area. It pays higher wages than most, if not all, industries in the area.

6. At all pertinent times the Albemarle facility at Roanoke Rapids has been an employer in an industry affecting interstate commerce and has more than 100 employees.

7. Defendant Local No. 425 (hereafter referred to as the "Union") is a labor organization which is and has been a party to collective bargaining agreements with Albemarle pertaining to production and maintenance employees at the Roanoke Rapids plant and negotiates on their behalf concerning the wages, terms and conditions of employment with respect to those employees. The Union is a labor organiza-

tion within the meaning of Section 701(d) and (e) of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e(d) and (e).

8. The operations of Albemarle, as is characteristic of pulp and paper mills throughout the United States and Canada, are organized on a departmental basis in accordance with the type of work performed in each department. The jobs within each department generally require skills and ability which differ from one department to another and each department has a specific function of its own in the overall operations of the mill. For purposes of employee classification and promotion, each of the departments is organized into one or more "lines of progression." In all but exceptional circumstances, entrance of new employees into each department is effected at the lowest-paying, least responsible job of the lines of departmental progression and vacancies are filled by promotions within the lines.

9. There are over 100 different jobs at the Roanoke Rapids plant ranging from Janitorial to Complex Machine Operator. Of these, approximately 86 are jobs traditionally reserved for white persons ranging from jobs of Helper and Laborer to Machine Operator.

10. Promotion and demotion within a line of progression is governed by seniority and ability. The 1965 and 1968 labor agreements provide in part that "when all factors that constitute ability are relatively equal, then seniority in keeping with established lines of progression within a given department shall prevail."

11. Thus, the seniority system utilizes "job seniority" for promotions and demotions. This means that the employee who has the greater seniority in the job within the line of progression immediately below the vacancy to be

filled would normally be given the first opportunity to fill the vacancy even though other employees in the same job classification have more plant and departmental seniority, assuming that the person has the necessary ability, experience and training to do the higher job.

12. When a layoff occurs within a line of progression or department, the employees bump downward and the most junior employees are either laid off or offered Call Board work. Employees who are returned to the Call Board or are laid off retain their seniority rights in their former department and line of progression, but do not have a seniority preference to an opening in a different department or line of progression.

13. A 1965 labor agreement provided that employees could request transfers from one department (or line of progression) to another department (or line of progression). This provision was contained in the labor agreements prior to 1965. Whether or not the transfer was granted was within the sole discretion of the company. If an employee transferred at his own request, his seniority in his former department or line of progression ceased immediately unless within thirty days the employee returned to his former department or line of progression because of his health or physical condition. When the transfer was affected at the request of the company, his seniority in the department (or line of progression) left would be retained for a period of six months from the date of transfer. An employee transferred would, therefore, enter at the bottom job in the line of progression and would suffer a reduction in pay if that job to which he was permitted to transfer carried a rate of pay less than the job from which he had transferred.

14. This provision was amended by the 1968 labor agreement to read:

"10.2.1 Employees who wish to transfer from one department (or line of progression) to another may file through their foreman with the Personnel Department of the Company written application stating the department (or line of progression) and the job therein to which he wishes to be transferred. The decision of the Company in granting or denying such request for transfer is to be final. However, when an employee transfers from one department (or line of progression) to another upon his own request, his seniority in the department (and line of progression) left shall cease immediately unless within thirty (30) days from the date of such transfer the health or physical condition of such employee makes it advisable to transfer him back to the department (or line of progression) left. Where the transfer is effected at the request of the Company, his seniority in the department (or line of progression) left shall be retained for a period of six months from date of transfer.

"10.2.2 When the Company grants a transfer as described in 10.2.1, then the transferred employee will be vested with department and job seniority equal to that held in his last job or equal to that held in the lowest job in the line of progression from which transferred.

"10.2.3 When the Company grants such a transfer as described in 10.2.1, then the transferred employee will be paid his present rate if higher than the rate of the job to which transferred until such time as the employee progresses to a job in the new line of pro-

gression which pays as much or more than his rate in his last classification in his former line of progression. An employee who is permitted to carry a higher rate to another department or line of progression shall have such rate reduced to the rate of the job to which he is transferred if the employee is deemed at the time a 'permanent' vacancy occurs in the next higher job in the new line of progression to be unqualified for such job, or with the Company's approval declines a promotion to such a job. Such an employee shall not lose his 'red circle' rate if deemed unqualified and the sole reason for his lack of qualification is a determination by the Company that he has not had sufficient time in the new line of progression to obtain the training and experience necessary for promotion. In applying Section 10.2.1, if the Company decides to fill a vacancy by transferring an employee who has made application pursuant to the foregoing provisions and there are on file more than one such application for the job opening, then the Company will offer the transfer to the senior qualified employee making application."

The rate retention provision referred to in Section 10.2.3 is commonly known as "red circling."

15. Prior to January 1, 1964, Albemarle's lines of progression were strictly segregated on the basis of race. Those lines of progression to which black employees were traditionally assigned were lower paying than the "white" lines of progression. The racial identifiability of jobs and departments in lines of progression were maintained subsequent to the effective date of Title VII (July 2, 1965). As of June 30, 1967, the racial composition of jobs, departments and lines of progression were as follows:

A. *Wood Yard Department*

	Negro	*White*
Yard Crew		
Crane Operator (Large)	0	9
Long Log Operator	0	4
Log Stacker Operator	0	4
Small Equipment Operator	0	4
Bulldozer Operator	0	1
Oiler	0	4
Chip Unloader	1	3
Chain Operator	0	4
Chipper Operator No. 2		
Chipper Operator No. 1	4	0
Tractor Operator	5	0
Chip Bin Operator	4	0
Laborers	12	0
Knife Grinder*	0	1
Service Crew		
Dempster-Dumper	1	0
Winch Truck Operator	3	0
Winch Truck Operator Helper	1	0
Laborer	6	0

B. *Pulp Mill Department*

Digester Operator	0	4
Stock Room Operator	0	4
Stock Room First Helper	0	4
Kamyr Operator	0	4
Stock Room Second Helper	0	4
Lead Loader-Blower	0	4
Loader	0	10

* The Knife Grinder is in the Wood Yard Department but is not in a line of progression. This position is occupied by a white person.

	Negro	*White*
CE Recovery Operator	0	4
First Helper No. 6	0	4
Second Helper	0	4
Caustic Operator	0	4
Lime Kiln Operator	0	4
General Utility Operator	0	1
By Products Operator	0	2
Payloader	1	0
Lancer	4	0
Salt Cake Man	1	0
Janitor-Dead End Job	1	0

C. *A Paper Mill Department*

Paper Machine Line Of Progression		
Machine Tender No. 1	0	4
Machine Tender No. 2	0	4
Back Tendeer No. 1	0	4
Third Hand No. 1	0	4
Third Hand No. 2	0	4
Fourth Hand No. 1	0	4
Fourth Hand No. 2	0	4
Front Plugger No. 1	0	4
Back Plugger No. 1	1	4
Back Plugger No. 2	0	4
Beaterman	0	4
First Helper	0	4
Brokeman	4	0
Stock Puller	0	0
Laborer	1	0

D. *B Paper Mill Department*

Machine Tender	0	8
Back Tender	0	8

	Negro	*White*
Third Hand	0	8
Fourth Hand	0	8
Fifth Hand	0	8
Sixth Hand	0	8
Seventh Hand	0	4
Spare Hand	1	5
Janitor-Dead End Job	5	0
Stock Room Operator	0	4
Stock Room First Helper	0	4
Stock Room Second Helper	0	4
E. *Product Department B Papermill*		
Sheeter Operator	0	2
Rewinder Operator (large)	0	4
Rewinder Operator Helper (large)	0	4
Rewinder Operator (small)	0	4
Sheeter Operator Helper	0	4
Wrapper, Tier, Capper	1	16
Rewinder Plugger	1	2
Core Cutter	0	2
Janitors	3	0
Scale Clerk	0	5
Lift Truck Operator	0	13
Utility Man	0	8
Laborers	0	6
F. *A Mill Finishing Department*		
Lead Loader	1	0
Lift Truck Operator	1	0
Lead Tier & Wrapper	1	0
Wrapper, Loader & Brokeman	2	0
G. *Boiler Department*		
Boiler Operator	0	4

	Negro	*White*
H. *Power Plant Department*		
Power Plant Operator	0	4
First Helper	0	4
Second Helper	0	4
Utility Man	0	4
I. *Technical Service Department*		
B Mill Shift Testman	0	4
A Mill Shift Testman	0	4
General Lab Testman	0	2
Lab Trainee	1	10
Lab Assistant	0	2
Lab Leadman	0	1
J. *Storeroom Department*		
Storeroom Clerk A	0	2
Storeroom Clerk C	0	1
Storeroom Clerk D	0	0
K. *Maintenance Department Employees*		
1st Maintenance Emp. Appren.	0	1
2nd Maintenance Emp. Appren.	0	9
3rd Maintenance Emp. Appren.	0	4
4th Maintenance Emp. Appren.	0	2
5th Maintenance Emp. Appren.	0	7
6th Maintenance Emp. Appren.	1	0
7th Maintenance Emp. Appren.	0	1
8th Maintenance Emp. Appren.	0	1
"C" Maintenance Employee	0	3
"B" Maintenance Employee	0	3
"A" Maintenance Employee	0	99
Leadman Maintenance Employee	0	7
L. *Miscellaneous*		
General Extra Board	2	62

	Negro	*White*
Utility Extra Board	50	0
Truck Drivers	0	4

The "Extra Boards" of Item "L" above were introduced in the early 1950's for the purpose of maintaining a reservoir of employees who would be available to staff entry level jobs in the various lines of progression. The General Extra Board fed the "skilled" lines of progression and the Utility Extra Board fd the "unskilled" lines of progression. Both were manned by new employees and employees who had been laid off of other jobs and were waiting recall.

16. The 1968 labor contract made certain changes in the lines of progression. The chipper operator and crew lines of progression were merged on the basis of rates of pay into one line of progression, as were the chipper operator and line crew lines of progression and the brokeman and beaterman lines of progression. Separate departments were created out of old departments and the "dead end" job of janitor was eliminated. These changes in the lines of progression had the effect of eliminating, to some extent, their strictly segregated composition. However, it is to be noted that black employees were still "locked" in the lower paying job classifications. For example, the line of progression and the black-white racial composition of the reorganized wood yard department were as follows:

Wood Yard Department

	Negro	*White*
Crane Operator (American)		
Crane Operator (large)	0	9
Long Log Operator	0	4
Log Stacker Operator	0	4
Small Equipment Operator	0	4
Bulldozer Operator	0	1
Oiler	0	4

	Negro	*White*
Chip Unloader	1	3
Chipper Operator No. 2	0	4
Chain Operator	4	0
Chipper Operator No. 1	5	0
Tractor Operator	4	0
Chip Bin Operator	12	0
Laborer		

Thus, the blacks occupied the bottom twenty-five job positions within the wood yard department.

17. The General Extra Board and the Utility Extra Board were merged in 1968. Employees on the merged board still retain recall rights to jobs and lines of progression which they held prior to being reduced to the call board. The effect of this practice is that black employees are recalled to black jobs and white employees are recalled to white jobs.

18. Prior to 1958 no employment personnel tests were given to applicants at the Roanoke Rapids plant. In about 1956 the personnel manager was requested to design a personnel screening program for use in the selection of new employees to be hired for jobs created by the installation of a new paper machine. In this connection two "paper and pencil" tests—the Revised Beta Examination (Beta) and the Bennett Mechanical Comprehension Test—were selected. New employees hired for the General Extra Board and the Maintenance Department were required to score successfully on the Beta as well as have a high school education.

19. In an effort to validate the Beta, the examination was administered to a sample of employees who worked on the No. 3 paper machine, maintenance employees and possibly some employees in the pulp mill. The method that was

followed is known by industrial psychologists as concurrent validation, that is, employees that were tested were then rated by their supervisors on the basis of performance on the job. As a result of this study, a cutoff score of 100 was established for the Beta. No blacks were known to be included in the validation sample.

20. Use of the Bennett Mechanical Test, which had previously been administered to job applicants, was discontinued in about 1963 and the company initiated use of the Wonderlic, A and B series, along with the Beta test. Since that time the two pre-employment tests, the Beta and the Wonderlic, series A and B, have been administered to applicants for Crane Operator (Wood Yard), Digester and C. E. Recovery (Pulp Mill), Paper Machine and Beater (A Paper Mill), Paper Machine and Stock Room (B Paper Mill), Power Plant Operator (Power Plant), Boiler Operator (Boiler Room), Mill and Laboratory (Technical Services) and Finishing and Shipping Crew (B. Mill Product) lines of progression.

21. The Beta examination is a nonverbal test, developed during World War I to measure the intelligence of illiterate and non-English-speaking individuals.

22. The Wonderlic, series A and B, are short, verbal, widely-used intelligence tests. The explanation given for the use of these tests is that it was felt that it was essential for new employees to have certain verbal facilities because of the increasing technical nature of the mill operation. The cutoff score which was utilized for the Wonderlic, series A and B, is 18 on either test.

23. A high school education requirement was introduced in the early 1950's in response to a difficulty in finding qualified people for a modernized pulp mill. It was intended to

assure a certain level of reading skill needed to comprehend the increasingly difficult material which accompanies technological innovations.

24. In December of 1964, Albemarle offered incumbent Negro employees who were then working in the Chipper, Service Crew, Payloader, Brokeman, First Fireman and Lead Loader lines of progression an opportunity to take the personnel tests in order to be considered for jobs in other lines of progression and waived its high school education requirement for incumbent black employees who could successfully pass these tests. This offer was made a second time on November 4, 1965, and some Negro employees took the test and were transferred. However, a majority of those who took the tests failed them.

25. Employees who do not have a high school education and who are in jobs in lines of progression are not required to successfully pass the test battery in order to be considered for future promotions in that line of progression. The policy applies to similarly situated white and black employees.

26. Albemarle has waived the necessity of successfully passing the test battery for a few of the black employees who do not have a high school education. Similarly, exceptions to this practice have been made for white employees.

27. Apart from the standardized lines of progression, Albemarle maintains a maintenance staff which services and repairs machinery throughout the mill. The maintenance staff is not served by the call boards. In 1959 the company with the agreement of the Union established a formalized training program for maintenance employees called the Maintenance Apprenticeship Program. A high school education and passing test scores are required for en-

trance into the program. Three employees selected by the Union and three members selected by the maintenance superintendent periodically review the performance of apprentices and recommend promotion or demotion within the program to the maintenance superintendent. The maintenance program is not divided into functional craft divisions. Thus, all employees in the program must qualify to acquire the skills of a machinist, welder, carpenter, electrician, painter, oiler, pipefitter, rigger, millwright and insulator during the apprenticeship program.

28. In 1964 prior to the effective date of the Civil Rights Act of 1964, the company began actively recruiting black applicants from the local high schools to apply for the Maintenance Apprenticeship Program. In addition, the company solicited applications from black employees working in other departments in the mill. The first black employee entered the program in 1964. There were five blacks in the program by September of 1967 and as of 1970, ten blacks had entered the program. All had successfully met the high school and test qualifications for entrance.

29. After the Supreme Court decision in Griggs v. Duke Power Company, 401 U.S. 424, 3 FEP Cases 175 (1971), Albemarle again conducted validation studies of its testing and educational requirements. The company employed an expert in the field of industrial psychology and testing to conduct the studies. This expert utilized two manuals which outlined generally-accepted procedures for determining criterion-related validity: "Guidelines of Employee Selection Procedures," Equal Employment Opportunity Commission, August 1, 1970, and "Standards for Educational and Psychological Tests and Manuals," published by the American Psychological Association.

30. In a study done on the testing requirements of Albemarle, the expert applied the "concurrent validation" technique to ten specific skill-related job groupings or lines of progression. An attempt was made to include in the sample all of the employees within the designated job groups. Two black employees refused to participate in the study, leaving only four blacks in the selected sample. Given this sample size, it was technically infeasible to validate the tests on a biracial basis.

31. Each employee in a job grouping was individually rated in comparison to every other individual employee in that grouping to obtain a ranking of job performance. The ratings took into consideration the elements of work behavior and job success. This rating method was performed twice by two different supervisors making independent evaluations. Neither of the raters had access to or knowledge of the sample employees' performance on the aptitude tests. The results of the dual ratings were then averaged to obtain the final job rating of the employees within each specific unit.

32. Each rated employee took, or had already taken, three tests—the Wonderlic Form A and Form B and the Beta Examination. The test scores were recorded for each individual. The tests were administered under controlled conditions by a trained personnel employee who had four years of experience administering these particular tests.

33. The sample group rated and tested consisted only of present employees. The group tested was typical of employees in the skilled lines of progression. They were selected from the top and middle of various lines. Professional studies have shown that when tests are validated in such a narrow range of competence, there is a

greater chance that the test will validate even a broader range, that is, if job candidates as well as present employees are tested.

34. The data obtained from the ratings and the data obtained from the test scores were mailed to Purdue University where statistical correlation was performed. The expert correlated the job performance ratings and the test scores using the "Phi coefficient" formula to determine whether successful performance on the test was related to successful performance on the job.

35. The results of the validation study, presented both in statistical and graphical form, showed positive correlations of a statistically significant nature for nine of the ten specific job groupings. More particularly, the study revealed that eight of the ten units correlated positively on at least one of the tests in a manner which could have occurred only by chance only once in a hundred times. One unit correlated positively in a manner that could have occurred only once in twenty times.

36. The conclusion of the validation studies was that "inspection of the correlations and charts shown in this report shows quite conclusively that both the Beta and Wonderlic A tests can be reasonably used for both hiring and promotion for most of the jobs in this mill. The charts indicate that a minimum score of 103 on the Beta for jobs in Recovery and Evaporation and a minimum score of 17 on the Wonderlic A for jobs in the other groups shown in the charts would not be at all out of line."

37. In addition to the validation studies that he performed on the aptitude tests, the defendants' expert undertook a specialized study to determine whether the company's high school requirement bore a significant relation

to the jobs for which it was a prerequisite. Since the high school requirement was instituted in the hope of improving the reading levels of new employees, the expert designed a study to focus on this variable.

38. The EEOC Testing Guidelines provide that "appropriate validation strategies" may be substituted for a criterion-related validity study where the latter is not technically feasible. Under these circumstances, strategies to measure "content" relationships are permitted. In the case of the high school requirement, neither of the two principal criterion-related methodologies were feasible. A "concurrent validation" study was not feasible because present employees did not constitute a statistically fair sample of high school graduates and non-high school graduates. Similarly, a "predictive validation" study was not feasible because that method, by its nature, would require the indiscriminate hiring of high school and non-high school control groups, measuring their performance over an extended period of time, then correlating the data. The company's expert designed a strategy to measure the verbal skills and aptitude needed to comprehend reading material and other "content" which is integral to successful performance on jobs in the skilled lines of progression. For the first phase of this test a professionally-developed formula, the "Flesch Readability Index," was used to measure the reading difficulty of standard Operating Manuals used in the skilled lines of progression at the Roanoke Rapids mill. These manuals contain information relating to the operation of sophisticated machinery. The sample manuals used in the study were chosen by normal "random selection" from a file containing all of the reading material used in the skilled lines. The second phase of the technique employed merely required the expression of the "Flesch Count" in terms of

the relevant criterion to be validated—in this case grades of education.

39. The "Flesch Index," which measures the difficulty of "content" based on syllable/word and word/sentence ratios, revealed that the reading difficulty of the Operating Manuals was such as to require the reading level of a high school graduate with perhaps some college. The expert concluded from his study that an individual must read at least at the level of a normal high school graduate to read the manuals.

40. The Operating Manuals contain information, the knowledge of which is required for the safe and efficient use of the machines and chemicals in the plant.

41. Some industrial psychologists believe that the average scores obtained by blacks as a group on written tests are lower than the average scores obtained by whites as a group. Although the reasons for this are not entirely clear, it is explained in part by the fact that blacks in many parts of the country obtain inferior schooling as compared to whites and, in part by the fact that in some cultural backgrounds where blacks are not accustomed to close working relationships with whites, test scores of blacks are affected by having the test administered by white examiners. This is true not only for blacks but also for Mexicans, Puerto Ricans and whites of a lower income group. Although psychologists have made and are making an effort to construct cultural-free tests, these efforts, in the opinion of some psychologists, have not been successful so far.

42. A personal tour of the defendants' plant in company with counsel for plaintiffs and defendants served to convince the court that much of the machinery now in use is of a highly sophisticated and technically complex nature.

Computers are used extensively throughout the production process as well as in the record-keeping, billing, shipping, purchasing and accounting operations. The efficient maintenance and operation of this machinery and electronic equipment obviously requires employees with a high level of native intelligence, prolonged training and experience.

Conclusions of Law

1. This court has jurisdiction of this action under the provisions of Section 706(f) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f).

2. The corporate defendants are employers in an industry affecting interstate commerce within the meaning of Section 701(b) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(b).

3. The defendant Local 425 is an organization engaged in an industry affecting commerce within the meaning of Section 701(d), (e) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(d), (e).

4. Plaintiffs have complied with the procedural requirements of Section 706(a), (d) and (e) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(a), (d) and (e).

5. Section 703(a) of Title 7, 42 U.S.C. § 2000e-2(a), prohibits an employer from discriminating against an employee "with respect to his compensation, terms, condition, or privileges of employment, because of such individual's race . . . ," or from limiting, segregating or classifying an employee "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race." Subsection (c) of the same sec-

tion defines as unlawful employment practices similar acts when done by a labor union. Subsection (h) provides that

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment *pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race* . . . nor shall it be an unlawful employment practice for an employer to give and to act upon the results of *any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race* . . . ." (Emphasis added.)

6. The Act does not provide redress for discriminatory employment practices occurring prior to July 2, 1965, the effective date of the Act. However, employment practices which tend to perpetuate past discriminations are unlawful unless there is an overriding legitimate non-racial business necessity, Griggs v. Duke Power Company, 401 U.S. 424, 3 FEP Cases 175 (1971); Robinson v. Lorillard, 444 F.2d 791, 3 FEP Cases 653 (4th Cir. 1971). And Section 706(g) of the Act, 42 U.S.C. § 2000e-5(g), provides for equitable relief only if the court finds that a defendant "has intentionally engaged in or is intentionally engaging in an unlawful employment practice." This provision has been interpreted to require only that the defendant "meant to do what he did, that is, his employment practice was not accidental." See Robinson, supra, at 796 (quoting from Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d at 996, 1 FEP Cases 875, 71 LRRM 3070). Viewed in this light, it is clear that Albemarle

practiced racially discriminatory employment practice prior to July 2, 1965; that the effects of this discrimination has been perpetuated; and that such employment practices are unlawful under Title VII of the Civil Rights Act of 1964.

7. It is undisputed that prior to January 1, 1964, Albemarle's lines of progression were strictly segregated on the basis of race. Negro employees were traditionally assigned to the lower paying lines of progression. Although overt racial discrimination ceased subsequent to the effective date of Title VII, the effects of this racial discrimination have not been eradicated. The job seniority system has resulted in blacks occupying the lower paying positions within an integrated line of progression. Other lines of progression remain essentially segregated because of the inability of black employees to meet the educational and testing requirements to transfer into other, higher-paying lines of progression. It follows that these practices must be enjoined in toto unless they have been shown to be "necessary to the safe and efficient operation of the business." Jones v. Lee Way Motor Freight, 431 F.2d 245, 249, 2 FEP Cases 895 (10th Cir. 1970), cited with approval in Robinson, supra.

8. This court has found as a fact that the efficient maintenance and operation of Albemarle's machinery requires a certain degree of training and experience. However, a system of promotion and demotion based upon *job seniority*, unrelated to the minimum tenure required to gain the necessary proficiency in that job classification, is arbitrary and, when viewed in the context of past discriminatory practices, constitutes an unlawful employment practice. A system of promotion and demotion based on *plant* seniority would accomplish the purpose of awarding faithful employees, and a job residency requirement, based upon the minimum tenure required to gain the skill and proficiency

of a given job classification, would insure the safe and efficient operation of the plant and the promotion of black employees relatively unhindered by past overt acts of employer discrimination. See Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980, 1 FEP Cases 875, 71 LRRM 3070 (5th Cir. 1969); Long v. Georgia Kraft Company, 2 FEP Cases 658 (N.D.Ga. 1970).

9. This court has also found as a fact that a certain level of native intelligence is required for the safe and efficient operation of Albemarle's often complicated and sophisticated machinery. The personnel tests administered at the plant have undergone validation studies and have been proven to be job related. The defendants have carried the burden of proof in proving that these tests are "necessary for the safe and efficient operation of the business" and are, therefore, permitted by the Act. However, the high school education requirement used in conjunction with the testing requirements is unlawful in that the personnel tests alone are adequate to measure the mental ability and reading skills required for the job classifications.

10. In addition to injunctive relief, the plaintiffs seek an award of the amount of pay which would have accrued to them had there been no unlawful practices. 42 U.S.C. § 706(g) provides that the court *"may . . . order* such affirmative relief as *may* be appropriate, including reinstatement or hiring of employees, *with or without back pay."* The statute thus speaks clearly in terms of the discretionary power of the court. See Local 186, International Pulp, Sulphite and Paper Mill Workers v. Minnesota Mining and Manufacturing Company, 304 F.Supp. 1284, 1 FEP Cases 764, 71 LRRM 2427 (N.D.Ind. 1969). Robinson, supra, can be read to hold that back pay is a compensa-

tion for a tangible economic loss and that the plaintiff is *entitled* to that compensation. However, the Fourth Circuit was there concerned with the defendant's contention that it was an abuse of discretion to *award* back pay. It did not address itself to the clear statutory language of Section 706(g).

In the instant case there was no evidence of bad faith non-compliance with the Act. It appears that the company as early as 1964 began active recruitment of blacks for its Maintenance Apprentice Program. Certain lines of progression were merged on its own initiative, and as judicial decisions expanded the then existing interpretations of the Act, the defendants took steps to correct the abuses without delay. And perhaps unlike the tobacco industry involved in Robinson, supra, the paper industry is justified in requiring that its employees possess a certain degree of training and experience. Furthermore, there is evidence to support a finding that Albemarle has consistently paid higher wages at all levels of employment than those paid by other industries in the area—doubtless a reflection of the sophistication of the industry.

In addition, an award of back pay is an equitable remedy. Robinson, 444 F.2d at 802, supra. The plaintiffs' claim for back pay was filed nearly five years after the institution of this action. It was not prayed for in the pleadings. Although neither party can be charged with deliberate dilatory tactics in bringing this cause to trial, it is apparent that the defendants would be substantially prejudiced by the granting of such affirmative relief. The defendants might have chosen to exercise unusual zeal in having this court determine their rights at an earlier date had they known that back pay would be at issue. See Rental Development Corporation of America v. Lavery, 304 F.2d 839, 842 (9th Cir. 1962), cited with approval in Robinson, supra.

On the basis of the foregoing Findings of Fact and Conclusions of Law it is now

Ordered, Adjudged And Decreed

I. Albemarle Paper Company (Delaware) and Halifax Local 425, United Papermakers and Paperworkers, AFL-CIO, their officers, agents, employees and servants and all persons in active concert or participation with them, are hereby permanently enjoined and restrained from discriminating against the Negro employees of the defendant Albemarle Paper Company (Delaware) at its paper mill in Roanoke Rapids, North Carolina, in violation of Title VII of the Civil Rights Act of 1964.

A. In particular, the defendants are ordered to abolish the existing seniority system based substantially on job seniority and to refrain from negotiating or implementing any other seniority system designed to discriminate or having the effect of discriminating against Negro employees, insofar as such systems may apply to permanent job assignments, and permanent promotions and lay-offs of employees in the affected class, in competition with other employees at the Roanoke Rapids paper mill of Albemarle Paper Company (Delaware).

B. In place of the seniority system so abolished, the defendants are ordered to implement and permanently continue a system of plant seniority with respect to permanent job assignments and permanent promotions and layoffs of employees in the affected class, so that in making permanent promotions or demotions within a line of progression, or in making permanent transfers, promotions or demotions to or from a line of progression, when employees of the affected class are competing with employees not of the affected class, and the qualifications of the competitors are

relatively equal, plant seniority rather than job seniority shall govern. Albemarle Paper Company (Delaware) shall not discriminate on the basis of race in making any temporary assignments, promotions, layoffs or demotions at its Roanoke Rapids plant.

C. Plant or mill seniority shall be determined as length of continuous service from most recent date of permanent employment.

D. Qualifications as used immediately above and elsewhere in this decree shall be deemed to refer to (1) ability and fitness, (2) knowledge and training, and (3) experience and skill developed during an employee's tenure at the mill. Where a member of the affected class with higher plant seniority competes for a job with a non-member having lower plant seniority, the latter shall not be deemed more qualified for promotion simply because of ability, fitness, knowledge, training, experience or skill which are the product of his longer tenure in job slots immediately below the vacancy, subject, however, to the use of reasonable residency requirements in job slots within lines of progression as set forth in Appendix A to this decree. The residency requirements of Appendix A are subject to amendment if the parties, within thirty days, submit additional evidence or stipulations bearing on the minimum on-the-job training requirements for safety and proficiency in a given job classification.

E. In making permanent promotions within a line of progression, or in making permanent transfers, promotions or demotions to or from a line of progression, the lowest paying job in each line of progression shall be the proper job for beginning in the line, and proper progression shall be to the job next higher than that currently held by the employee.

F. Normal seniority provisions, without the modifications of this decree, shall prevail in making permanent promotions or demotions:

1. When employees not of the affected class compete with each other, such as when no employees in the job classification from which the promotion or demotion is to be made are of the affected class, or when there are two or more employees not of the affected class who have longer company service than an affected class employee in the job classification from which the promotion or demotion is to be made;

2. When employees of the affected class compete with each other, such as when all employees in the job classification from which the promotion or demotion is to be made are of the affected class, or when there are two or more employees of the affected class who have longer company service than an employee who is not of the affected class in the job classification from which the promotion or demotion is to be made.

G. Employees who are transferred from one line of progression to another shall carry their seniority and wage rate as provided in Section 10.2.2 and 10.2.3 of the current Labor Agreement, except that in no event shall the rate retention right or "Red Circle" rate exceed $3.36 per hour (straight time). The "Red Circle" protection provided in this paragraph shall apply to only one transfer made pursuant to this decree.

H. Defendants are directed to amend the seniority provisions of Section 10 of the Labor Agreement to provide for the posting of all permanent vacancies to entry level jobs in the various lines of progression as contained in Ap-

pendix A. Such posting shall be for three (3) calendar days on the clock house bulletin board.

I. The defendants are permanently enjoined and restrained from requiring a high school education as a prerequisite for employment, promotion or transfer.

II. The defendants are directed to amend the Labor Agreement to include provisions for assignments from the Call Board incorporating the following terms:

A. Immediately after a determination has been made of available job assignments, and prior to any assignments being made, employees meeting the shift who have recall rights to any job listed must indicate to the clock room attendant whether or not they wish to exercise such recall rights.

B. Thereafter the senior qualified employee meeting the shift in terms of plant or mill seniority will be given the choice of all the then available jobs. Succeeding offers will been made to those meeting the shift in order of their decreasing mill seniority.

C. Requests coming in after posting of the lists and the start of assignments shall be immediately made available to those meeting the shift who have not already received assignments.

III. The request for abolition of or changes in testing procedures is denied for the reasons set forth in the Findings of Fact and Conclusions of Law.

IV. The request for an award of back pay is denied for the reasons set forth in the Findings of Fact and Conclusions of Law.

V. Counsel for the parties are directed to confer among

themselves in an effort to reach an agreement on reasonable attorneys' fees for plaintiffs' counsel and the apportionment thereof among the defendants. They shall report to the court within thirty days of the entry of this decree whether they have been able to reach an agreement, and if not the court will then determine the amount of fees and their apportionment.

It Is So Ordered.

Appendix A

Method For Calculating Residency Requirements

When calculating time spent on a particular job for purposes of determining when the residency requirement has been satisfied, the following will be counted toward satisfaction of the residency requirement of a particular job classification:

1. Time worked while permanently assigned to the job in question.

2. Time worked while permanently assigned to a job below the job in question but assigned on a temporary basis to the job in question, provided such temporary time on the job equals or exceeds 48 hours in any calendar month, in which case all such temporary time in that month will be counted. In the event that temporary time on a particular job does not amount to 48 hours in one calendar month, all such temporary time in that month will be counted toward satisfying the residency requirement of the job to which the employee is then permanently assigned.

Time worked on either a permanent or temporary basis as defined above shall satisfy residency requirements as follows:

1. 172 hours actually worked shall satisfy one month of residency.

2. 40 hours actually worked shall satisfy one week of residency.

Residency Requirements

Wood Yard Department	
Crane Operator (American)	
Crane Operator (Large)	11 mos.
Long Log Operator	9 mos.
Log Stacker Operator	8 mos.
Small Equipment Operator	8 mos.
Bulldozer Operator	6 mos.
Oiler	6 mos.
Chip Unloader	3 mos.
Chipper Operator No. 2	3 mos.
Chain Operator	3 mos.
Chipper Operator No. 1	3 mos.
Tractor Operator	3 mos.
Chip Bin Operator	3 mos.
Laborer	1 mo.
Pulp Mill Department	
Digester Operator (Cooker)	
Stock Room Operator	12 mos.
Stock Room First Helper	12 mos.
Stock Room Second Helper	6 mos.
C. E. Recovery Operator	
1st Helper No. 6	15 mos.
Evaporator Operator (when used)	12 mos.
1st Helper No. 5	12 mos.
2nd Helper	9 mos.
Utility Helper	4 mos.
Caustic Operator	
Lime Kiln Operator	12 mos.
By Products Operator	

Leadloader—Blower	9 mos.
Loader	6 mos.
Power Plant	
Power Plant Operator	
1st Helper	18 mos.
2nd Helper	12 mos.
B Mill Shipping	
Scale Clerk	
Lift Truck Operator	12 mos.
Utility Man	9 mos.
Laborer	3 mos.
Boiler Room Department	
Boiler Operator	
Bark Burner Operator	10 mos.
1st Fireman	9 mos.
2nd Fireman	6 mos.
Laborer	3 mos.
B Paper Mill Department	
Paper Machine Progression	
Machine Tender	
Back Tender	36 mos.
3rd Hand	24 mos.
4th Hand	12 mos.
5th Hand	4 mos.
6th Hand	2 mos.
7th Hand	1 mo.
Stock Room Progression	
Stock Room Operator	
Stock Room 1st Helper	12 mos.
Stock Room 2nd Helper	6 mos.

Technical Service	
Mill Progression	
B Mill Shift Testman	
Additive Man	15 mos.
Laboratory	
General Lab Testman	
General Lab Assistant	15 mos.
Sampleman	6 mos.
Trainee	3 mos.
Service Department	
Payloader	
Dempster-Dumpster Operator	10 mos.
Winch Truck Operator	9 mos.
Truck Operator	9 mos.
Winch Truck Operator Helper	3 mos.
Laborer	1 mo.
Store Room Department	
Storeroom Clerk A	
Storeroom Clerk B	6 mos.
Storeroom Clerk C	6 mos.
Storeroom Clerk D	6 mos.
A Paper Mill Department	
Paper Machine	
Machine Tender No. 1	
Machine Tender No. 2	30 mos.
Back Tender No. 1	26 mos.
Back Tender No. 2	26 mos.
Third Hand No. 1	24 mos.
Third Hand No. 2	24 mos.

Fourth Hand No. 1	12 mos.
Fourth Hand No. 2	12 mos.
Front Plugger No. 1	4 mos.
Back Plugger No. 1	4 mos.
Back Plugger No. 2	3 mos.
A Paper Mill Department	
Beater Room	
Beaterman	
1st Helper	12 mos.
Brokeman	6 mos.
Shipping Room Department A Mill	
Lead Loader	
Lift Truck Operator	12 mos.
Lead Tier and Wrapper	6 mos.
Wrapper, Loader, Laborer	3 mos.

* * *

APPENDIX B

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Before Boreman and Bryan, Senior Circuit Judges, and Craven, Circuit Judge.

Craven, Circuit Judge:

This is a class action arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. Plaintiffs are representative members of the class composed of all Negroes employed at defendant's Roanoke Rapids plant and all Negroes who may hereafter apply for employment at the Roanoke Rapids plant. The multitude of defendants is occasioned by changes in corporate ownership which occurred subsequent to the institution of the action. Since the Roanoke Rapids operation has at all pertinent times been called the Albemarle Paper Company, the corporate defendants will hereinafter be referred to as Albemarle.

The district court found that Albemarle practiced racially discriminatory employment practices prior to July 2, 1965, and that the effect of that discrimination had been perpetuated through a job seniority system. Thus, the district court enjoined Albemarle and the defendant union, Halifax Local 425, United Papermakers and Paperworkers, AFL-CIO, from discriminating against Negro employees, and ordered that the job seniority system be abolished and a plant-wide seniority system be implemented. There has been no appeal from these provisions of the court's decree.

The district court refused to order the abolition of or changes in the pre-employment testing procedures used by Albemarle. Plaintiffs appeal from the district court's determination. Judge Boreman concurs with Judge Craven in reversing and remanding to the district court on this issue. Judge Bryan dissents.

The district court also refused to award the plaintiffs back pay. Judge Bryan concurs with Judge Craven in reversing the district court on this issue. Judge Boreman dissents.

The effect of this division in the court is to reverse and remand the district court's determination as to the testing procedures and the refusal to award back pay.

I

Testing Procedures

Prior to 1958, no employment personnel tests were given to applicants for employment at Albemarle. In 1956, the personnel manager was requested to design a screening program for selection of employees for certain departments. In this connection, the Revised Beta Examination (Beta) and the Bennett Mechanical Comprehension were selected to test applicants. A brief study was made at that time to determine the usefulness of the Beta test.

About 1963, the then personnel manager discontinued using the Bennett Mechanical Test since it had not been studied. Use of the Wonderlic Test, A and B series, was initiated at that time. Whereas the Beta is a non-verbal test developed to measure the intelligence of illiterate and non-English speaking individuals, the Wonderlic Tests are *verbal* tests of general mental ability. Use of the Wonderlic Tests was adopted in connection with the Beta because Albemarle felt it essential for new employees to have a certain level of verbal facility because of the increasing technical nature of the operation and the increasing use of printed instructions in the operation of machinery and the like.

The operations of Albemarle are, like other pulp and

paper mills, organized on a departmental basis. For purposes of employee classification and promotion, each department is organized into one or more lines of progression. Entrance into each department is effected at the bottom of a line of progression and employees move up, depending on their ability and experience, as vacancies occur. In all, Albemarle has 11 separate departments containing 17 lines of progression. Since 1963, applicants for 8 of these departments and 14 of the lines of progression were required to score successfully on the Beta and Wonderlic pre-employment tests.

After the Supreme Court decision in Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), Albemarle hired an expert in industrial psychology and testing to conduct a validation study of its pre-employment testing procedures. A validation study determines whether test results have a significant relationship to actual performance on the job. The technique adopted for the validation study of Albemarle's tests was concurrent validation. In concurrent validation, a sample of current employees occupying the jobs, or job groups, in question is selected. These employees are then given the tests, and the test scores compared with one or more criteria of the employee's ability to perform their jobs.

Albemarle's validation study covered 10 job groups in only 8 of the 14 lines of progression, and 5 of the 8 departments for which the tests are required. The sample of employees was generally selected from the higher level jobs and encompassed approximately 30 percent of the different jobs for which tests are required. The test scores from that sample were compared with two supervisors' comparative ratings of employees in each job slot. The criteria for the supervisors' ratings was: "Excluding a man's attitude, just

how well the guy can do the job when he's feeling right." (A. 471). No job analysis was done for the jobs in question.

Albemarle's expert found that one of the tests was validated for 9 of the 10 job groups studied. However, both tests were valid for only one job group.

The effect of the district court's approval of Albemarle's testing procedure is to approve a validation study done without job analysis, to allow Albemarle to require tests for 6 lines of progression where there has been no validation study at all, and to allow Albemarle to require a person to pass two tests for entrance into 7 lines of progression when only one of those tests was validated for that line of progression. We think this was error.

[1] Title VII of the Civil Rights Act "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." Griggs v. Duke Power Co., 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed. 2d 158 (1971). If an employment practice, though facially neutral as the testing procedures here, is shown to have a differential impact on minority employment, it is prohibited unless the employer can prove business necessity. *Griggs*, at 432, 91 S.Ct. 849. The plaintiffs made a sufficient showing below that Albemarle's testing procedures have a racial impact.[1] It was thus incumbent upon Albemarle to establish business necessity[2] by showing that its testing requirements

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[1] It was demonstrated in plaintiff's exhibits that on the Wonderlic Series 96 percent of whites passed as opposed to 64 percent of blacks. This corresponds with the natural average as determined in a study by the authors of the test. Negro Norms. A Study of 38,452 Job Applicants for Affirmative Action Programs, E. F. Wonderlic & Assoc., Inc. (1970).

[2] "[T]he applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business.

"have a manifest relationship to the employment in question." *Griggs*, at 432, 91 S.Ct. at 854. United States v. Jacksonville Terminal Co., 451 F.2d 418, 455-457 (5th Cir. 1971).

While § 703(a)(2), (h)[3] specifically authorizes professionally developed tests not used to discriminate, *Griggs* makes clear that that section allows only those tests proven to be job related. 401 U.S. at 436, 91 S.Ct. 849. In so holding, the Court gave great deference to the interpretation of the Act evinced in a set of guidelines by the enforcing agency, the Equal Employment Opportunity Commission. *Griggs*, at 433-434, 91 S.Ct. 849. We have also recently noted with approval these guidelines. Robinson v. Lorillard Corp., 444 F.2d 791, 798 n. 7 (4th Cir. 1971).

[2] We think Albemarle has failed in several respects to show that its tests are job related, have a manifest relationship to employment, and have been validated in accordance with EEOC guidelines.

In developing criteria of job performance by which to

Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative polices or practices which would better accomplish the business purpose advanced, or accomplished it equally well with a lesser differential impact."
Robinson v. Lorillard Corp., 44 F.2d 791, 798 (4th Cir. 1971). *See also*, Note, Employment Testing: The Aftermath of Griggs v. Duke Power Company, 72 Colum.L.Rev. 900, 908 (1972).

[3] § 703(a)(2), (h) provides in relevant part:
"Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin."
42 U.S.C.A. § 2000e-2(h).

ascertain the validity of its tests, Albemarle failed to engage in any job analysis. Instead, test results were compared with possibly subjective rating of supervisors who were given a vague standard by which to judge job performance. Other courts have expressed skepticism about the value of such ill-defined supervisor appraisals. *See, e. g.,* Rowe v. General Motors Corp., 457 F.2d 348, 452 (5th Cir. 1972). Also Cooper and Sobol have stated in their article, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv.L.Rev. 1598, 1662 (1969):

> Supervisory ratings, for example, which are possibly the single most common performance measure used in validity studies, are subject to personal prejudice. When test scores are correlated with such ratings, the validation, if it can be called that, is of questionable value and may simply prove that the test has the same bias as the supervisors.

Likewise, in this regard the EEOC guidelines provide:

> (3) The work behaviors or other criteria of employee adequacy which the test is intended to predict or identify must be fully described; and, additionally, in the case of rating techniques the appraisal form(s) and instructions to the rater(s) must be included as part of the validation evidence. Such criteria may include measures other than actual work proficiency, such as training time, supervisory ratings, regularity of attendance and tenure. Whatever criteria are used they must represent major or critical work behaviors as revealed by careful job analyses.
>
> (4) In view of the possibility of bias inherent in subjective evaluation, supervisory rating techniques

should be carefully developed, and the ratings should be closely examined for evidence of bias.

* * *

29 C.F.R. § 1607.5(b) (1970).

We agree that some form of job analysis resulting in specific and objective criteria for supervisory ratings is crucial to a proper concurrent validation study. *See,* Western Addition Community Organization v. Alioto, 340 F.Supp. 1351, 1354-1355 (N.D. Cal. 1972). To require less is to leave the job relatedness requirement largely to the good faith of the employer and his supervisors. The complaining class is entitled to more under the Act.

[3] Even if the validation procedures had been proper, it was error to approve the testing procedures for lines of progression where there had been no validation study. In this case the tests were approved as a requirement for 6 lines of progression for which the tests had not been validated. While it is true that a test need not always be validated for each job for which it is required, there are narrow limits on when a test may be used without validation. The EEOC guidelines provide:

> (2) Where a test is to be used in different units of a multiunit organization and no significant differences exist between units, jobs, and applicant populations, evidence obtained in one unit may suffice for the others. 29 C.F.R. § 1607.4(c) (1970).

In this case, a failure to perform job analyses in the lines of progression involved in the validation study and in the other lines of progression for which the tests are required

prevents concluding that no significant differences exist in the jobs in question.[4]

Not only was it error to approve the testing procedures for lines of progression not validated, but it was also error to approve requiring applicants to pass two tests for positions where only one test was validated. Albemarle seeks to justify this under the business necessity rule. Albemarle originally hires all employees into a pool. From this pool the employees move into a line of progression as vacancies occur. Since it is not known into which line of progression an employee will be placed, Albemarle asserts there is nothing wrong with requiring all employees to be qualified for any line.

[4] Albemarle has not shown that hiring all employees into a pool is necessary to the safe and efficient operation of

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[4] The appellants also question the validity of the validation study because the employees tested were primarily from higher level, rather than entry level, positions. As pointed out by the EEOC guidelines, 29 C.F.R. § 1607.4(c)(1) (1970), such a validation technique is permissible only where new employees will progress to the higher level "within a reasonable time and in a great majority of cases." As stated by Cooper & Sobol, Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv.L.Rev. 1598, 1649 (1969):

> In addition, the problems inherent in test use are compounded by the fact that the higher level jobs may not be reached for several years, during which time an employee may improve his capabilities. This possibility seems particulalry likely in the case of an individual whose potential has been artificially suppressed through discrimination, in education and otherwise. In order for a promotability interest to justify test use, therefore, it is essential that the test have been properly evaluated and shown to be predictive of performance at some job level to which promotions can be expected in the reasonable future.

In *Griggs* the Court failed to reach the question of whether a testing procedure which takes into account higher level job requirements is permissible, 401 U.S. at 432, 91 S.Ct. 849. We likewise fail to reach this question because of insufficient evidence below as to the time in which it takes an employee to progress to higher level jobs.

its business, nor has it shown that hiring employees for specific lines of progression is not an acceptable alternative. This they were required to prove to justify their policies under the business necessity test. Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971).

Thus we hold that the district court erred in upholding the validity of the pre-employment personnel tests and in refusing to enjoin their use.

II

Back Pay

Title 42 U.S.C. § 2000e-5(g) provides in relevant part:

> The court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay . . . .

The district court found that Albemarle had practiced discriminatory employment practices and that these practices had been perpetuated through a job seniority system. Consequently, the district court enjoined Albemarle and the defendant union, Halifax Local 425, from continuing the discriminatory practices. Nevertheless, the district court, finding an award of back pay to be within his discretion, refused to award back pay to the complaining class. The reasons given by the district court for refusing such an award were that the claim for back pay was filed nearly five years after the institution of the action, and that there was no evidence of bad faith noncompliance with the Act. Neither of these is sufficient to justify the district court's refusal to award back pay.

In Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971), a case which also dealt with a seniority system which perpetuated past discriminatory practices, the defendants made the contentions presented to us here.

> The complaint filed by the plaintiffs in the District Court did not specifically request an award of back pay. . . . At a pretrial hearing concerning the appropriateness of a class action, one of the lawyers for the plaintiffs clearly indicated that the suit was one for injunctive relief rather than recovery of lost wages. It was not until well after trial of the case, though before the judge had entered a decision, that a request was made for additional relief in the form of back pay for the class.

444 F.2d at 802-803. In *Robinson,* as here:

> [B]ecause the obligation to provide back pay stems from the same source as the obligation to reform the seniority system, any general defenses relevant to the back pay award were equally relevant to the suit for injunctive relief . . . . The defendants have in no way been prejudiced by the belated claim.

444 F.2d at 803.

Other courts have held likewise. The Fifth Circuit held, in United States v. Hayes Int'l Corp., 456 F.2d 112 (1972), that the broad aims of Title VII require that the issue of back pay be fully developed and determined even though it was not raised until the post-trial stage of litigation.

Also, the Seventh Circuit, in a case which was not a class action, remanded the case in order that " 'relief should be made available to all who were so damaged whether or not they filed charges and whether or not they joined in the

suit.'" Sprogis v. United States Air Lines, Inc., 444 F.2d 1194, 1202 (7th Cir.), cert. denied, 404 U.S. 991, 92 S.Ct. 536, 30 L.Ed.2d 543 (1971).

In *Robinson* the argument was also made that back pay should not be awarded where the defendant had acted in good faith. Put negatively, the argument, urged by Albemarle, is

> that back pay should not be awarded in the absence of a specific intent to discriminate. A corollary argument is that the award was improper in light of the unsettled state of the law. The principal answer to both points is that back pay is not a penalty imposed as a sanction for moral turpitude; it is compensation for the tangible economic loss resulting from an unlawful employment practice. Under Title VII the plaintiff class is entitled to compensation for that loss, however benevolent the motives for its impostion.

444 F.2d at 804. *See also,* Johnson v. Goodyear Tire & Rubber Co., 349 F.Supp. 3, (S.D.Tex., 1972) (also a seniority case where good faith was present).

The only significant difference between *Robinson* and the present case is that in *Robinson* the district court had awarded back pay and the district court below refused to award back pay. The question then is whether, in light of the broad aims of Title VII, this court may affirm the opposite result as to back pay on similar factual situations because such award rests in the discretion of the district judge.

[5] "Discretion in a legal sense necessarily is the responsible exercise of official conscience on all the facts of a particular situation in the light of the *purpose for which the power exists.*" Bowles v. Goebel, 151 F.2d 671, 674 (8th

Cir. 1945) (emphasis added). Thus in determining the proper scope of the exercise of discretion, the objective sought to be accomplished by the statute must be given great weight. Hecht Co. v. Bowles, 321 U.S. 321, 331, 64 S.Ct. 587, 88 L.Ed. 754 (1944). Where a district court fails to exercise discretion with an eye to the purposes of the Act, it must be reversed. Wirtz v. B. B. Saxon Co., 365 F.2d 457 (5th Cir. 1966) Shultz v. Parke, 413 F.2d 1364 (5th Cir. 1969).

"The clear purpose of Title VII is to bring an end to the proscribed discriminatory practices and to make whole, in a pecuniary fashion, those who have suffered by it." Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 720 (7th Cir. 1969). In light of the congressional purpose, courts should give "a wide scope to the act in order to remedy, as much as possible, the plight of persons who have suffered from discrimination in employment opportunities." Rowe v. General Motors Corp., 457 F.2d 348, 354 (5th Cir. 1972).

Also, as we stated in Robinson, "[t]he back pay award is not punitive in nature, but equitable—intended to restore the recipients to their rightful economic status absent the effects of the unlawful discrimination." 444 F.2d at 802. See also, Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969).

[6, 7] Because of the compensatory nature of a back pay award and the strong congressional policy embodied in Title VII, a district court must exercise its discretion as to back pay in the same manner it must exercise discretion as to attorney fees under Title II of the Civil Rights Act. *See Bowe, supra* 416 F.2d at 719. Thus, a plaintiff or a complaining class who is successful in obtaining an injunction under Title VII of the Act should ordinarily be awarded back pay unless special circumstances would render

such an award unjust.[5] Newman v. Piggie Park Enterprises, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968). *See Bowe, supra* 416 F.2d at 719-720.

[8] Because there are no such special circumstances here, on remand the district court should include an award of back pay in its order. It is to be remembered, of course, that a back pay award is limited to damages which are actually suffered. Lea v. Cone Mills Corp., 438 F.2d 86 (4th Cir. 1971).

Reversed.

Boreman, Senior Circuit Judge (concurring in part and dissenting in part):

I am in agreement with the result reached by Judge Craven in that portion of his opinion which holds that Albemarle Paper Company has failed to show a business relationship between the racially biased tests administered to prospective employees, and its personnel requirements. However, from that portion of his opinion reversing the district court's refusal to award back pay, I must respectfully dissent.

The appellants advance multiple theories in their effort to persuade this court to modify the relief granted below to include an award of back pay. The two arguments approved and adopted by Judge Craven are: first, the equation of § 706(g) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g), with § 706(k) of the Act. 42 U.S.C. § 2000e-5(k), which provides for an award of attorney's fees in the discretion of the court and under which the

[5] For examples of such special circumstances said to justify refusal of a back pay award, *see* Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002 (9th Cir., June 20, 1972); Le Blanc v. Southern Bell Tel. & Tel. Co., 333 F. Supp. 602, 610-611 (E.D.La.1971), aff'd, per curiam, 460 F.2d 1228 (5th Cir. 1972).

federal courts have held attorney's fees are to be awarded as of course,[1] in the absence of "special circumstances"; and second, that failure to grant back pay was an abuse of discretion under Robinson v. Lorillard, 444 F.2d 791 (4 Cir. 1971).

In Lea v. Cone Mills, 438 F.2d 86, 88 (4 Cir. 1971), this court, over my strenuous objections stated in dissent, extended the holding of the Supreme Court in Newman v. Piggie Park Enterprises, 390 U.S. 400, 402-403, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968), that attorney's fees should ordinarily be granted in suits under Title II of the Act,[2] to include suits under Title VII as well. A study of the relevant sections and the reasoning behind the *Newman* and *Lea* decisions reveals the fallacy of a comparison between the provision for attorney's fees and for back pay.

The pertinent provisions with respect to the allowance of attorneys' fees under Title II and Title VII are virtually identical, and each was considered by Congress as sufficiently significant to be expressed in an individual subsection.[3] However, the grant of authority to award back pay is found in a compltetely different subsection of Title

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[1] Lea v. Cone Mills, 438 F.2d 86, 88 (4 Cir. 1971).

[2] *Accord*, Wooten v. Moore, 400 F.2d 239, 242 (4th Cir. 1968).

[3] Title II, 42 U.S.C. § 2000a-3(b):

(b) In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person.

Title VII, 42 U.S.C. § 2000e-5(k):

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

VII, the congressional separation of these two provisions indicating an intent to treat them independently. Furthermore, the subsection in which the provision for back pay is found generally sets out the equitable remedies which the district court may utilize in fashioning relief should the complaining party prevail, indicating no congressional intent to give an award of back pay any greater presumption of appropriateness than its companion remedies.[4]

More significant, however, is the reason for which the district courts' discretion was found to be limited with respect to the award of attorney's fees to prevailing parties plaintiff. In bringing an action against an employer (or manager of a public accommodation under Title II) for discrimination in the operation of his business, the plaintiff is more than a private party litigant; he acts as a "private attorney-general" in vindicating the interests of the public, and it is this advancement of the commonweal that is the basis for allowing attorney's fees as of course.[5] Such a public purpose is not present in the more delicate task of fashioning the appropriate equitable relief to fit the peculiar fact pattern of each case, and the monetary award is intended to redress purely private inequities.[6]

I must conclude, therefore, that the award of back pay, unlike the grant of attorney's fees, is an element of affirm-

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[4] The authorities generally deal with injunctive relief as within the discretion of the district courts. *E. g.* Sprogis v. United Air Lines, 444 F.2d 1194, 1202 (7 Cir. 1971).

[5] Lea v. Cone Mills, 438 F.2d 86, 88 (4 Cir. 1971). *See* Jenkins v. United Gas Corp., 400 F.2d 28, 32 (5 Cir. 1968). Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv.L.Rev. 1109, 1254 (1971).

[6] *See*, Austin v. Reynolds Metals, 327 F. Supp. 1145, 1153 (E.D. Va.1970).

ative relief which has been entrusted to the more general discretion of the district courts.[7]

Judge Craven's opinion also apparently adopts the view that this court's decision in Robinson v. Lorillard, *supra* stands for the proposition that under facts similar to those in *Robinson,* it would be an abuse of the district court's discretion to deny a request for back pay. Such a construction misinterprets the holding in *Robinson* and the proper scope of appellate review of discretionary decisions. The burden of persuasion falls on the party attempting to show an abuse of discretion and not on the successful party below.[8] In *Robinson* the holding of this court was that the appellant company failed to show, under the factual situation before the district court, that it was an abuse of discretion *to award* back pay, not that back pay was mandated under those circumstances. The term "discretion"[9] denotes that more than one acceptable alternative is available and the choice of the most appropriate is properly left in the hands of the district courts which are more inti-

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[7] *E. g.,* Schaeffer v. San Diego Yellow Cabs, 462 F.2d 1002, 1006 (9 Cir. 1972); LeBlanc v. Southern Bell Tel. & Tel., 460 F.2d 1228, 1229 (5 Cir. 1972); United States v. Dillon Supply Co., 429 F.2d 800, 804 (4 Cir. 1970); Johnson v. Georgia Highway Express, 417 F.2d 1122, 1125 (5th Cir. 1969). Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv.L.Rev. 1109, 1265 (1971).

[8] LeBlanc v. Southern Bell Tel. & Tel., 460 F.2d 1228, 1229 (5 Cir. 1972).

[9] The Supreme Court has defined "discretion" as follows:

> The term "discretion" denotes the absence of a hard and fast rule. . . . When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result.

Langnes v. Green, 282 U.S. 531, 541, 51 S.Ct. 243, 247, 75 L.Ed. 520 (1931).

mately involved with the ambiance of the cases and the merits of each position than are the Courts of Appeal.[10]

> "'*We must keep in mind that the discretion is to be exercised by the district court and not by a court of review. This court should not substitute its discretion for that of the district court.*'" (Emphasis supplied by *Larson.*) Larson v. United States, 296 F.2d 167, 170 (8 Cir. 1961).

The first reason assigned by the district court for its refusal to award back pay—that there was no evidence of bad faith noncompliance with the Act as evidenced by the active recruitment of Negroes into the company's training program for certain skilled lines of progression as early as 1964, the company-initiated merger of some lines of progression to increase advancement opportunities and good faith attempts to validate its testing procedures[11]—is not sufficiently compelling, in and of itself, to support a denial of back pay. In *Robinson* this court made clear that the remedy of back pay is not in the nature of a punishment but is an equitable measure to restore those discriminated

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[10] United States v. Dillon Supply Co., 429 F.2d 800, 804 (4 Cir. 1970):

> The government has urged us to remand with directions to enter specific injunctive relief. After careful consideration we have concluded to deny this request. The fashioning of effective and appropriate injunctive relief depends in part on the discretion of the district court. The function of the courts of appeal is to review the relief which the district court grants in light of findings and the supporting record and to determine if there has been an abuse of discretion.

[11] In 1963 the company discontinued the use of the Bennett Mechanical Comprehension Test, which is regarded to be racially biased (See Cooper and Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv.L.Rev. 1598, 1641 n. 16 (1969)) in favor of Wonderlic A & B tests.

against to their proper economic position had the complained of actions not occurred.[12] This is not to say, however, that the good faith of the company may never be taken into account in considering and determining the proper relief to be granted.[13] Should there exist equitable factors of which the district court may properly take cognizance, and which are supportive of a decision to deny back pay, then innocence and good faith efforts on the part of the employer may be factors to be weighed in the balancing of equities.

Some insight into the proper application of that equitable balancing power may be gained from an examination of the third argument advanced by the appellants, a comparison of § 706(g) with § 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c). In the case of Phelps Dodge v. N.L.R.B., 313 U.S. 177, 61 S.Ct. 845, 85 L.Ed. 1271 (1941), which was decided under § 10(c), the Labor Board had ordered reinstatement of a discriminatorily discharged employee together with a full award of back pay, although the employee had not earned wages during the period of his lay-off. In remanding to the Board for modification in light of the principle of mitigation of damages, the Supreme Court stated:

> [T]he advantages of a simple rule must be balanced against the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment. The Board, we believe, overestimates administrative difficulties and underestimates its administrative resourcefulness. Here again we must avoid the rigidities of an either-or-rule. The remedy of back pay, it must be remembered, is entrusted to

[12] 444 F.2d 791 at 802, 804.

[13] *See*, Schaeffer v. San Diego Yellow Cabs, 462 F.2d 1002, 1006-1007 (9 Cir. 1972).

> the Board's discretion; it is not mechanically compelled by the Act. And in applying its authority over back pay orders, the Board has not used stereotyped formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations. (313 U.S. at 198, 61 S.Ct. at 854.)

The primary factor given by the district court in the instant case was prejudice to the interests of the company arising from representations made by the appellants in their status as plaintiffs below. During the early stages of this case, the company moved for Summary Judgment and in replying to that motion,[14] the plaintiffs set out the limits of the relief sought:

> It is important to understand the exact nature of the class relief sought by plaintiffs. No money damages are sought for any member of the class not before the court, nor is specific relief in the way of job changes, promotions or the like being sought for any member of the class not before the court. The only relief sought for the class as a whole is that defendants be enjoined from treating the class as a separate group and discriminating against the class as a whole in the future....
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> * * *
>
> [T]he matter of specific individual relief for other class members is not before this Court.

Judge Craven in the majority opinion erroneously characterizes the prayer for back pay as merely a tardy request, when as illustrated above, it in fact was a reversal of ex-

[14] The answer was filed on November 22, 1966.

press representations made three and one-half years prior to the request for additional relief.[15] This situation is plainly distinguishable from *Robinson,* in which the oral representation by counsel for the plaintiffs that no monetary relief was sought was made at pre-trial conference. The prejudice to Albemarle stemmed not from a failure of defenses, with which this court was concerned in *Robinson,* but from the unconscionably long delay between the express disclaimer and the unindicated, abrupt reversal of position.

Rule 54(c), Federal Rules of Civil Procedure, provides that the federal courts "shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings," but this is not the ordinary case of a mere failure to request a specific form of relief; here there was an express and formal disclaimer of intention to seek that particular remedy. An opposing party should be permitted to rely on such a statement, and to the extent that in relying thereon he has acted to his detriment,[16] Rule 54(c) does not mandate the grant of the contested award.[17]

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[15] The request was first communicated to the company on June 4, 1970.

[16] Illustrations of the detriment arising from the reliance of the defendants upon the express disclaimer by the plaintiffs of their intention to seek back pay for members of the class generally, were argued before the district court at pretrial conferences: (1) The extensive period of time taken for prosecution of the suit exposed the defendants to the unexpected hazard of a potentially enormous award, unavailable for consideration during their continued efforts to arrive at a settlement, and which threatened the financial viability of the defendant paper mill. (2) During the hiatus with respect to the back pay claim, the paper mill was sold by the defendant Ethyl Corp. to the defendant Hoerner-Waldorf Corp., with the transfer agreement taking express notice of the pendency of suit, a strong indication of the impact the status of that suit had upon the deliberations of the principals. (3) The inordinately long delay tended to preclude the

More importantly, Rule 54(c) is merely the vehicle by which the party is to obtain the "relief to which he is entitled." The relief and the entitlement thereto are to be determined by the district court under § 706(g), and Rule 54(c) cannot compel the grant of relief which is within the discretion of the district court. The court below did not base its refusal to award back pay on the failure to request such relief pursuant to Rule 8(a). F.R.Civ.P., but by virtue of its discretionary powers under § 706(g); the source of the claim of authority for granting the award sought is the very source relied upon by the court below to deny the request.

I do not find it possible to say that the reasons assigned by the district court in support of its decision not to award back pay show an abuse of discretion, and I would therefore affirm the decision below. Under the circumstances here I would not be willing, in any event, to go beyond a direction to the district court to investigate the propriety of awarding back pay with respect to those named plaintiffs actually before the court since the representations of the appellants in their Memorandum in Opposition to Summary Judgment explicitly indicate an intent to seek affirmative, individual monetary relief only for themselves, a relatively small group, and for no others.

ALBERT V. BRYAN, Senior Circuit Judge (dissenting in part, and concurring in part):

I would affirm the District Court's refusal to enjoin the employee testing practices of Albemarle Paper Com-

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defendants from adequately preparing a defense to individual claims, due to the impossibility or impracticality of deposing witnesses and claimants nearly five years after the occurrences of events of which plaintiffs complain.

[17] Rental Development Corp. v. Lavery, 304 F.2d 839, 842 (9 Cir. 1962).

pany. However, I would reverse for its deprival of the employees of an opportunity to recover back pay, if any, lost by reason of the practice of fixing seniority on a job instead of a plant basis.

One cannot read the District Judge's opinion without being impressed by its thoroughness, completeness and fairness. Overall, save for the disallowance of back pay just mentioned, I think the opinion honors the dictates of the Civil Rights Act of 1964 and squares with the exactions of the Act as expounded in Griggs v. Duke Power Company, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

While Judge Craven's recitation of the facts is altogether accurate, I would add this synopsis. A full appraisal of the Court's ruling calls for review of the steps taken by Albemarle to meet the statute's demands. Before the effective date of the Civil Rights Act of 1964, Albemarle commenced recruitment of black applicants from the nearby high schools for participation in the company's apprentice program. It also sought applications from among its black employees.

Following *Griggs*, Albemarle conducted validation studies of its testing requirements. To this end an acknowledged expert in such matters was retained. He gauged his study by the manual, among others, issued August 1, 1970 by the Equal Employment Opportunity Commission, entitled "Guidelines of Employee Selection Procedures." Pursuant to his directions each employee was given three well-known tests, the Wonderlic, Forms A and B, and the Beta. The tests purported to show the employee's capability to do the work assigned him. His performance was thereafter rated twice by two different supervisors, who made independent evaluations without knowledge of his test scores.

The test results and job ratings were sent to Purdue

University for statistical correlation. The District Judge found:

> "35. The results of the validation study, presented both in statistical and graphical form, showed positive correlations of a statistically significant nature for nine of the ten specific job groupings . . . ."

The expert advised that "the company utilize these tests for its initial hiring," observing, however, that "no test or set of tests will validate for all jobs." With this evidence in mind, I look to the errors ascribed in Judge Craven's opinion to the District Court's refusal to direct Albemarle to abolish or change its testing procedures.

I. First, I cannot agree that the employer did not validate the tests and relate them to the jobs in *all* the lines of skilled employment. The District Judge found otherwise, saying: "The group tested was typical of employees in the skilled lines of progression." This, for me, is a conclusion that the groups tested fairly exemplified the remaining groups and also fairly represented the qualifications existing in *all* the skilled lines. This reading of his factual findings is reinforced by his later statement: The *personnel* tests administered at the plant have undergone validation studies and *have been proven* to be job related." (Accent added.) This statement, I understand, encompasses all the groups at the plant, whether tested directly or by sample. Such a method of testing in a multiunit organization is, as noted by Judge Craven, approved by the Guidelines of Employee Selection Procedures, supra, § 1607.5.

The breadth of the expert's survey is described in his report as follows:

"General Summary:

> "Inspection of the correlations and charts shown in this report shows quite conclusively that both the Beta and Wonderlic A tests *can be reasonably used for both hiring and promotion for most of the jobs in this mill.* . . . The EEOC could not reasonably object to these standards in the light [of] the validation data covered in this report." (Accent added.)

Secondly, in view of the findings by the Court that validation studies had been applied to the personnel tests and that the tests had been proved to be job related, I cannot join in the determination that discrimination resulted from the absence of "job analyses." It seems to me that these findings necessarily recognize that the equivalent of "job analysis" was utilized. In rating the employees, the jobs' features were undeniably considered, for the supervisors were unquestionably familiar with these elements.

Thirdly, also unwarranted, it seems to me, is criticism of the District Court's acceptance of the company's practice of "requiring applicants to pass two tests for positions where only one test was validated." The two are the Beta and Wonderlic. Beta (non-language) measures merely native intelligence, while Wonderlic (verbal) tests reading ability. The District Court justifies its approval of Albemarle's utilizing both tests because it was a business necessity. The Court found that the complexity of Albemarle's newly adopted machinery made reading an absolute requirement for the safe and efficient operation of the machines and called for employees "with a high level of native intelligence." A personal inspection of the machinery revealed the intricacy to the judge.

Each of these aptitude tests is "demonstrably a reasonable measure of job performance." *Griggs,* at 436, 91 S.Ct. at 856. Thus they are their own proof of their validation. My

understanding is that a test cannot be declared discriminative if it searches for an indispensable factor of a job. *Griggs,* supra, at 431, 91 S.Ct. 849.

It does not appear from the District Judge's findings that low scores on one or both tests would bar all applicants for employment. Decisions on employment in nontechnical areas are apparently not made solely upon test results, but include such considerations as experience, references and interviews.

In my judgment the District Judge, in regard to the testing requirements, exercised a cautious solicitude, both for the employees' entitlements and the employer's obligations under the Civil Rights Act of 1964. His injunction against a high school education as a job prerequisite and against the use of job seniority instead of plant seniority removed the employees' sustainable grievances. Ten days were devoted to the hearing of the case—July 26 to August 5, 1971. With this industry and application, along with the knowledge of the rigors of *Griggs,* as well as of the EEOC guidelines, the District Judge did not, to my mind, omit or deviate in any significant degree from the Act. It must be remembered, throughout, that the three items of the District Judge's determination just enumerated constitute findings of fact, and I cannot say they are clearly erroneous.

II. Lastly, recovery was asked by the plaintiffs for "the amount of pay which would have accrued to the employees had there been no unlawful practice." Under the Act, 42 U.S.C. § 2000e-5(g), back pay may be ordered in accompaniment of an injunction—and only then— against an employer who has engaged in "an unlawful employment practice" and has done so "intentionally."

As Judge Craven notes, the District Court found that "Albemarle has practiced racially discriminatory employ-

ment . . . prior to July 2, 1965 and that the effect of this discrimination had been perpetuated through a job seniority system." Accordingly the Court issued an injunction, pursuant to the Act, against the maintenance of this discrimination, terming it "an unlawful employment practice" and concluding that it had been committed "intentionally." No objection was made by the employer to this finding and conclusion, and no appeal taken from the injunctive order. Indeed, in the oral argument of the appeal the appellee-defendants conceded that the District Judge had indeed stated this conclusion on "intentionally."

For this reason I think back pay lost by an employee through the company's resort to job-seniority should be recovered. Of course, the reimbursable loss must be proved to be the direct result of the invidious practice and, as Judge Craven admonishes, the grant of monetary relief is not to exceed the "damages which are actually suffered."

Conclusion

In sum, as set for in Part I hereof, I dissent from Part I of Judge Craven's opinion; but I concur with the award, in his Part II, of back pay insofar as it is granted for loss occasioned by the job seniority practice, as explained in my Part II.

APPENDIX C

42 U.S.C. §§ 2000e-2(a), 2000e-2(h) AND 2000e-5(g)

42 U.S.C. § 2000e-2(a)

APPENDIX C

42 U.S.C. §§ 2000e-2(a), 2000e-2(h) AND 2000e-5(g)

42 U.S.C. § 2000e-2(a)

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

42 U.S.C. § 2000e-2(h)

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be unlawful employment practice for an employer to give and to act upon the

results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or use to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

* * *

42 U.S.C. § 2000e-5(g)

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admis-

sion, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

* * *

SUPREME COURT, U. S.

OCT 15 1974

MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-428

HALIFAX LOCAL NO. 25, UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, *Petitioner*

v.

JOSEPH P. MOODY, ET AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No.

HALIFAX LOCAL NO. 25, UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, *Petitioner*

v.

JOSEPH P. MOODY, ET AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Halifax Local No. 25, United Papermakers and Paperworkers, AFL-CIO, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.*

OPINIONS BELOW

The opinion of the court of appeals entered February 20, 1973 (Appendix (App.) A, *infra,* pp. 1a-25a) is reported at 474 F.2d 134. The opinion and order of the district court, entered November 9, 1971 (App. B, *infra,* pp. 26a-57a), is reported at 4 FEP Cases 561.

JURISDICTION

The judgment of the court of appeals (App. C., *infra,* p. 58a) was entered on February 20, 1973. Petitioner's timely petition for rehearing with suggestion

for rehearing in banc was ultimately denied on July 22, 1974 (App. E, *infra*, p. 60a-61a). The order of the court of appeals (App. D., *infra*, p. 59a-60a), directing that its mandate be stayed for a period not to exceed thirty days, pending the filing of applications to this Court for a writ of certiorari, was entered on September 13, 1974.[1] The jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTION PRESENTED

Whether in construing the remedial provisions of the Civil Rights Act of 1964, the court of appeals has power to order the district court—in this and virtually all other cases henceforth—to award "back pay" as a matter of course to complainants whenever unlawful employment practices are enjoined, despite the Congressional intendment as set forth in § 706(g) of the Act, that the district court in its discretion "may . . . order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay . . ."

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[1] The highly unconventional course of the antecedent proceedings is detailed in our Statement of the Case (*infra*, p. 3), involving as it does the convening of a rehearing in banc which was aborted after oral argument but prior to the issuance of a decision. In view of the subsequent resolution by this Court of a question of judicial administration critical to the granting of the in banc rehearing, certified pursuant to 28 USC 1254(3) (*Moody* v. *Albemarle Paper Co.*, —*U.S.*—, 41 L.Ed. 358, 91 S. Ct. —), the court of appeals on July 22, 1974 retroactively "denied" the petitions for rehearing and suggestion for rehearing in banc (filed by Petitioner herein and by the employer, Albemarle Paper Company) and "rescinded" its order for the rehearing in banc, which had been entered July 25, 1973 (*infra*, p. 6; App. E, *infra*, pp. 60a-61a).

STATUTES INVOLVED

The pertinent provisions of Sections 701(b), 703(a), 703(c), 703(h), 705(a), 706(a), 706(e), 706(f), 706 (g), 706(k), and 716(a), Title VII, Civil Rights Act of 1964, 78 Stat. 241, 42 USC § 2000(e) *et seq.*, are set forth in Appendix F, *infra*, pp. 61a-64a.

STATEMENT OF THE CASE

The Proceedings in the District Court and Court of Appeals Prior to the In Banc Rehearing

In November, 1971, the district court concluded, in a class action suit brought against the Albemarle Paper Company and Halifax Local No. 25, United Paper-makers and Paperworkers, AFL-CIO (the Union, petitioner herein) under Title VII of the Civil Rights Act of 1964 (42 USC § 2000e, et seq.), that the seniority system of the Company, at its Roanoke Rapids, North Carolina plant, operated to continue the effects of past discrimination which had not been eradicated, and ordered it restructured, with the substitution of plant for job seniority. The district court denied the plaintiffs' request for an award of back pay to the class, on multiple grounds including corrective action taken over the years and prejudice to the employer and union defendants resulting from the belated assertion of a monetary claim nearly five years after institution of the action, reversing an earlier and long-standing disclaimer on the score. (App. B, *infra*, pp. 47a-48a). The trial court also held that the Company had sustained its burden of proving that its pre-employment personnel testing procedures had undergone requisite validation and were job related, hence non-discriminatory.

On appeal of the testing and back pay rulings, a majority of the court below, on February 20, 1973, re-

versed the district court on both issues. Designated and assigned to the three-judge division which heard the case, were the court's two retired or senior judges, along with Judge Craven, who is in regular and active service. A different senior judge joined Judge Craven to constitute a majority for reversal and remand on each ground of appeal—and, correspondingly, a different senior judge dissented on each of the two issues.[2] With respect to the question of back pay, separate opinions were filed by each of the three judges—opinions that differed demonstrably on the principles of law and statutory construction that should govern review of the exercise of discretion vested in the trial judge under the statute. (App. A, *infra,* pp. 10a-13a, 14a-21a, 24a-25a).

The Convening of the In Banc Rehearing and Its Aftermath

The Union, on March 6, 1973, filed a petition for rehearing with suggestion for rehearing in banc, solely on the back pay issue, as did the Company, but with respect to both the back pay and job testing issues.[3] The Union contended in its petition that the majority opinions on the back pay question introduced entirely novel concepts in judicial interpretation and enforcement of the relevant statutory provisions, with a resultant holding that marked a wide departure from the settled principles theretofore endorsed by the court below and

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[2] Thus (1) on the testing procedures issue, Judge Craven and Senior Judge Boreman were in the majority, with Senior Judge Bryan dissenting, while (2) on the back pay issue, Judge Craven and Senior Judge Bryan formed the majority, with Senior Judge Boreman dissenting.

[3] The Union took no part in the argument on the testing issue, a management prerogative outside the scope of conventional collective bargaining.

the other circuit courts of appeals. The Union urged further that the majority opinions, for all practical purposes, precluded the trial court, in this and all other such potential suits generated at the district court level, from exercising any degree of discretion on the remedial issue of back pay awards, and—contrary to the statutory concept—placed back pay on a mandatory basis.

On June 25, 1973, the court below entered an order granting the petitions for rehearing in banc, with the statement that "a majority of the judges in regular active service, plus Senior Judges Boreman and Bryan, who were members of the original panel, have voted to grant the petitions." Following the filing of supplemental briefs, all parties participated in oral argument at the in banc rehearing convened on October 2, 1973, with the bench composed of the seven active and two senior judges of the court below. However, a decision was never issued, notwithstanding a "tentative vote" to "modify the panel decision with respect to an award of back pay" (App. G, *infra,* p. 66a).

Called into question was the eligibility of the two senior judges—who sat on the original division by designation—to vote in the threshold determination of whether the case should be reheard in banc, since both "voted for it", while "a majority of the judges in active service did not"; the affirmative votes of the two senior judges proved "crucial" to "providing a majority of the counted votes in favor of rehearing in banc" (App. G, *infra,* pp. 66a, 67a.).[4] This Court held,

[4] It was the "custom of the court below" to count the votes of senior circuit judges who were members of the initial hearing panel "when the court was polled on the question of *en banc* rehearing, . . . since the voting senior circuit judge would be a member of the *en banc* court if rehearing were granted" (App. G, *infra,* p. 67a).

the question having been submitted in the interim by certificate of the court below pursuant to 28 USC § 1254(3), that "senior circuit judges who are members of the originally assigned division hearing a case are not authorized by Congress to participate in the determination whether to rehear that case in banc". *Moody* v. *Albemarle Paper Co.*, — U.S. —, 41 L.Ed. 358, 360, 94 S.Ct. — (June 17, 1974).

The court below, by order of July 22, 1974, declared that, in view of this Court's decision, its order entered a year earlier "setting this case for rehearing in banc" was currently "rescinded" as "improvidently entered", and the initial "petitions for rehearing and rehearing in banc" were "denied" (App. E, *infra*, pp. 60a-61a). Thus the initial decision and judgment of the three-judge panel were reinstated.[5]

The Initial Panel Decision on Back Pay To Which the Court of Appeals Reverted

A divided court of appeals, reversing the district court's discretionary refusal to award back pay, held that "a plaintiff or a complaining class who is successful in obtaining an injunction under Title VII of the Act, should ordinarily be awarded back pay unless special circumstances would render such an award unjust" (App. A, *infra*, p. 13a; footnote omitted). Illustrative of the caliber of "special circumstances the majority would require "to justify refusal of a back pay award", is the example cited, wherein an employer

[5] Upon motions filed by both the Company and the Union, the court of appeals recalled its judgment (issued in lieu of mandate) and granted a stay of mandate not to exceed thirty days from September 13, 1974, pending the filing of petitions for a writ of certiorari (App. D, *infra*, p. 59a). *Cf.*, Federal Rules of Appellate Procedure 28 USC Rule 41(b).

pleaded the necessity of complying with state protective legislation, limiting the hours of work for female drivers, as a defense against charges of employment discrimination.[6] This back pay doctrine—announced for the first time and declared binding upon the district courts—was premised in essential part on the view that "a district court must exercise its discretion as to back pay in the same manner it must exercise discretion as to attorneys' fees under Title II of the Civil Rights Act"; thus, either "are to be awarded as of course in the absence of 'special circumstances' " (App. A, *infra,* p. 13a).

"Strenuous objections" to the foregoing rationale were raised by the dissenting judge, who pointed to "the fallacy" of equating the granting of attorneys' fees under Title II of the Civil Rights Act of 1964 [in accordance with *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400 (1968)], with back pay under Title VII of the Act (App. A, *infra,* p. 14a). In concluding that "the award of back pay, unlike the grant of attorneys' fees, is an element of affirmative relief which has been entrusted to the more general discretion of the district courts", the dissenting opinion emphasized the significance of two factors: (1) that "the congressional separation of these two provisions indicated an intent to treat them independently"; and (2) that while back pay is among "the equitable remedies which the district court may use in fashioning relief", there is no evi-

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[6] A factor that was held exculpatory until the statute relied upon was declared invalid. (App. A, *infra,* p. 13a, footnote 5). "*Schaeffer* v. *San Diego Yellow Cabs, Inc.*, 462 F.2d 1002 (9th Cir., June 20, 1972; *LeBlanc* v. *Southern Bell Tel. & Tel. Co.*, 333 F. Supp. 602, 610-11 (E.D. La. 1971), aff'd per curiam, 460 F.2d 1228 (5th Cir., 1972)". The *LeBlanc* case, *supra,* presented a closely analogous situation.

dence of "congressional intent to give an award of back pay any greater presumption of appropriateness than its companion remedies" (App. A, *infra*, p. 15a; footnote omitted).

The dissenting opinion further stressed the impropriety of overriding the "equitable balancing power" vested by statute in the district court, which is charged "with the more delicate task of fashioning the appropriate equitable relief to fit the peculiar fact pattern of each case"—a function "properly left in the hands of the district courts which are more intimately involved with the ambiance of the cases and the merits of each position than are the Courts of Appeal" (App. A, *infra*, pp. 17a-18a; footnote omitted).

REASONS FOR GRANTING THE WRIT

1. This case presents a novel and important question of federal law which has not been but should be decided by this Court. The issue was resolved by the court below incompatibly with settled principles of appellate review as well as the time-honored prohibition against the substitution of judicial for legislative judgment in statutory construction, and hence warrants immediate consideration by this Court.

The majority opinions, requiring that "back pay ordinarily be awarded" if an injunction issues, for all practical purposes preclude the trial court, in this and future cases, from exercising any degree of discretion on the remedial aspect of back pay awards, in deciding cases under Title VII of the Civil Rights Act of 1964 (the Act). This approach is in the teeth of the now familiar phraseology (of Section 706(g))[7] providing

[7] 42 USC § 2000(e)-5 (App. F, *infra*, p. 64a).

that the "court *may* enjoin the respondent from engaging in such unlawful practice, and order such affirmative relief as *may* be appropriate, which *may* include reinstatement or hiring of employees, with or without back pay . . .". (Underscoring supplied.) Indeed, over the course of almost a decade in the operation of the Act, as this Court has observed, in "Title VII cases . . . the courts have relied on the fact that the decision whether to award back pay is committed to the decision of the trial judge". *Curtis* v. *Loether*, — U.S. —, 39 L.Ed. 2d 260, 268, 94 S.Ct. —.

The decision below thus marks a definitive breach of that judicial precedent, and is of manifest general and public importance. If the broad edict of the court below remains undisturbed, it will predetermine all present and potential suits involving this issue that may be generated at the district court level within the aegis of the Fourth Circuit, with far-reaching consequences for both the labor force and management side in the industrial sector of our economy, to say nothing of the effective enforcement of the Act itself.

The legislative history of Title VII of the Act leaves no doubt that the approach reflected in the decision below is contrary to the intent of Congress on this score. The power to order appropriate affirmative action, as finally embodied in Section 706(g) of the Act, was deliberately placed on a discretionary basis, with the responsibility for the exercise of that discretion lodged with the Federal district court bench. While the original version of the bill in the House of Representatives, provided for mandatory affirmative relief (H.R. 7152), the provision in question was reversed in the Senate

(Amendment No. 656). As Senator Dirksen explained:[8]

> "The mandatory requirement for affirmative action, including reinstatement and back pay, upon a finding of violation, has been revised to read '*may* . . . order such affirmative action as may be appropriate, which *may* include reinstatement and back pay' ". (Emphasis added.)

Some seven years after enactment, the original pattern of Section 706(g) was etched even more sharply by the Congress in the 1972 Amendments.[9] Added to its "affirmative action" feature, (*viz.*, "and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay") was the further permissive clause —"or any other equitable relief as the court deems appropriate", thus strengthening the discretionary hand of the district court to tailor its decree to the requirements of the particular case.

Nevertheless, the court below, almost a year later, moved in the opposite direction to announce an inflexible position which the Congress had considered and rejected both in 1972, and earlier in 1964. In so doing, the majority opinion seriously overreached the "function of the court of appeals" which "is to review the relief the district court grants in the light of the findings and supporting record and to determine if there

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[8] 110th Cong. Rec. 12381-85 (June 5, 1964).

[9] The Equal Employment Opportunity Act of 1972, Public Law 92-961, approved March 24, 1972.

has been an abuse of discretion",[10] but not to "substitute its discretion for that of the district court".[11]

The decision below works mischief in the law on still another ground. To the extent that the mandatory back pay holding below promulgates a hard and fast rule which the subordinate district courts must follow in the future to forestall reversal, it compromises the prohibition implicit in Article III of the Constitution against federal courts passing on claims not ripe for determination.

"[T]he oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." C. Wright, *Federal Courts* 34 (1963). As this Court stated in *United States* v. *Fruehauf*, 365 U.S. 146, 157, "such advance expressions of legal judgment upon issues which remain unfocused" are inappropriate because they "are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests * * *."

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[10] *United States* v. *Dillon Supply Co.*, 429 F.2d 800 (4th Cir., 1970).

[11] *Larson* v. *United States*, 296 F.2d 167, 170 (8th Cir. 1961).

As this Court pointed out long ago in *Langes* v. *Green*, 282 U.S. 531, 541 (1931):

> "The term 'discretion' denotes the absence of a hard and fast rule. When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result."

Accord: *Burns v. United States*, 287 U.S. 216, 222-223 (1932).

The adverse effects, in the field covered by this reform legislation, of improperly expanding the role of the court of appeals while severely constricting that of the district court, contrary to Congressional design, are manifold.

In enacting Title VII and making it mandatory that the Equal Employment Opportunity Commission "*shall* endeavor to eliminate any such alleged employment practice by informal methods of conference, conciliation and persuasion" (42 USC 2000e(5)(b), italics added), Congress established a statutory scheme which seeks to utilize these techniques to the full in remedying employment discrimination.[12] The court decisions have uniformly implemented this legislative objective, and the 1972 Amendments to Title VII, carry forward a renewed faith by the Congress in the efficacy of this approach.[13] However, by virtually guaranteeing complainants under the Act, an award of back

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[12] As one student of the legislative history stated:

> "Congress apparently decided that the objectives of the Act could be better served by giving the informal measures of conciliation and persuasion a chance to work . . . . The conciliation process has several features which recommend it: it may solve problems without the animosities created by coercion; it gives the respondent a change to explain and possibly justify his conduct before litigation receives widespread public attention; it is less expensive and time consuming than litigation; and broad relief is available . . ." 84 Harvard Law Review 1109, 1199-1200 (1971).

[13] In introducing the conference report of House Resolution No. 1746, Representative Perkins stated:

> "Conferees contemplate that the Commission will continue to make every effort to conciliate as is required by existing law. Only if conciliation proves to be impossible do we expect the Commission to bring action in federal district court to seek enforcement." Cong. Rec.—House, p. 1861 (March 8, 1972).

pay or differential pay if discrimination is judicially determined under whatever circumstances, the majority opinion would place an undue premium on litigation, however protracted, in derogation of the conciliation feature of the Act. No one is well served by this result, least of all those whom the Act is primarily designed to protect.

Another important consequence is the peril which labor organizations now face—whether locals like Petitioner herein, with only meager resources, or international unions—in the prospect of meeting formidable or enormous assessments by way of back pay liability, to say nothing of defraying plaintiffs' attorneys' fees as well, that threaten to strip their funds to the point of bankruptcy. Typically, union liability, as here rests on the judicially developed theory that it was a party to a collective bargaining contract which, through its seniority system, carried over the effects of past (pre-Act) discrimination.[14] Nothing in the legislative history of the Act suggests that Congress, or indeed the leadership of the AFL-CIO which was in the forefront of those advocating the enactment of anti-discrimination legislation, envisaged this development, imposing, as it does, a tension and conflict between two national labor policies, embodied in landmark legislation. The one, set forth in the National Labor Relations Act,[15] was to promote collective bargaining procedures through freely chosen representatives, with the necessary costs of performing these traditional union functions spread

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[14] *Local 189, United Papermakers and Paperworkers, AFL-CIO* v. *United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

[15] National Labor Relations Act, As Amended (61 Stat. 136, 73 Stat. 519) 29 USC 151 *et seq.*

among all the employees who benefit.[16] The other, incorporated in Title VII of the Act, established a new category of unfair employment practices covering racial and other working minorities, in effect, supplementing the unfair labor practices defined by the National Labor Relations Act some three decades earlier.

In the case at bar and numerous others that run parallel in the industrial sector, the plaintiffs pursuing the class action are likewise active and supportive members of the union, which is joined as a co-defendant along with the employer, and hence likewise a target, of late, for back pay claims by the affected class.[17] Thus court orders directed against a union for monetary liability, may benefit a member of the plaintiff class at first blush, but at the same time work to his detriment as a member of the union who pays dues—the sole source of union revenue—and depends upon union bargaining skills and services.

The difficulty is an obvious one, if, as may be the case, the monetary order in question is of such proportions as to threaten the union with financial ruin. That is why the decision below should not be permitted to negate the legislative wisdom, which left the district court free to fashion a remedial order according "to what is right and equitable under the circumstances

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[16] *Cf., International Association of Machinists* v. *Street,* 367 U.S. 740, 755, 760-761.

[17] In the first five or six years after the effective date of the Act, when litigation focused upon the question of restructuring seniority rights and the substantive obligations of employers, the Department of Justice did not request back pay in its so-called "pattern and practice suits" filed under the Act. E.g.: *Local 189, United Papermakers and Paperworkers* v. *United States, supra.*

and the law". *Lagnes* v. *Green, supra,* 282 U.S. at 541. Here, as under the National Labor Relations Act from which the back pay concept was derived,[18] this Court's view appears equally pertinent (*Phelps Dodge* v. *N.L.R.B.,* 313 U.S. 177 (1941)):

> "Here again we must avoid the rigidities of an either-or rule. The remedy of back pay, it must be remembered, is entrusted to the Board's discretion; it is not mechanically compelled by the Act. And in applying its authority over back pay orders, the Board has not used stereotyped formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations." (313 U.S. at 198.)

2. There is a bluntly stated conflict between the decision of the United States Court of Appeals for the Third Circuit in *Kober* v. *Westinghouse Electric Corp.,* 480 F.2d 240 (3rd Cir. 1973) and the decision below. Sustaining the district court's conclusion that "the award of back pay was discretionary and . . . inappropriate in the circumstances of this case," a unanimous Third Circuit took direct issue with the majority opinion below, adopting instead the "more persuasive reasoning" of "the dissenting opinion of Judge Boreman." The court of appeals in *Kober* reaffirmed the traditional judicial test:

> "The statute says that the court may order such affirmative action as may be appropriate, with or without back pay. It is our determination that this language clearly leaves the award or denial of back pay to the discretion of the district court, to

[18] See, e.g.: *Legis. Hist. Titles VII and XI of Civil Rights Act of 1964,* at 3015, 3039, 3041 (EEOC undated).

> be exercised in the light of all the circumstances of each case."

(480 F.2d at 246-247).

More importantly, the disarray into which the decision below casts the question at issue by its abrupt departure from long-standing judicial precedent, including the earlier contrary decisions of the Fourth Circuit, calls for an exercise of this Court's power of supervision. As this Court recognized in *Curtis* v. *Loether, supra,* the cases are legion in which the courts have subscribed to the standard of review restated in *Kober* v. *Westinghouse Electric Corp., supra.*

The schism within the Fourth Circuit itself is highlighted by the initial grant of an in banc rehearing, which, while aborted prior to final decision for extraneous reasons concerning appellate procedure, nonetheless produced a "tentative vote to "modify the panel decision with respect to an award of back pay" (*supra,* p. 5). While the circumstances are extraordinary, with the in banc rehearing nullified, they afford a revealing insight into the different schools of thought on this issue still extant in the circuit below.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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October 13, 1974

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-1267

JOSEPH P. MOODY, THEODORE DANIELS, HENRY HILL, and ARTHUR MITCHELL, *Appellants,*

versus

ALBEMARLE PAPER COMPANY, a Virginia Corporation; UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, and HALIFAX LOCAL NO. 425, UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO,

and

ALBEMARLE PAPER COMPANY, a Delaware Corporation, HOERNER WALDORF CORPORATION, a Delaware Corporation, FIRST ALPACO CORPORATION, and ETHYL CORPORATION, a Virginia Corporation, *Appellees.*

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Amicus Curiae*

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Franklin T. Dupree, Jr., District Judge.

(Argued October 3, 1972 Decided February 20, 1973).

Before BOREMAN and BRYAN, Senior Circuit Judges, and CRAVEN, Circuit Judge.

George Cooper and Robert Belton (J. LeVonne Chambers; Chambers, Stein, Ferguson and Lanning; T. T. Clayton; Clayton and Ballance, Conrad O. Pearson, Jack Greenberg,

William L. Robinson, Morris J. Baller, Eric C. Schnapper, on brief) for Appellants; Leonard Appell (Warren Woods, Betty Southard Murphy, Wilson, Woods and Villalon, and James B. Ledford, on brief) for Appellee, Halifax Local 425, United Papermakers and Paperworkers, AFL-CIO; Francis V. Lowden, Jr., (Paul M. Thompson, Hunton, Williams, Gay and Gibson, Gordon G. Busdicker, Faegre and Benson, Julian R. Allsbrook, Jr., Allsbrook, Benton, Knott, Allsbrook and Cranford, Charles F. Blanchard, and Yarborough, Blanchard, Tucker and Denson, on brief) for Appellees, Albemarle Paper Company, et al; Martin Slate, Attorney, Equal Employment Opportunity Commission, (John De J. Pemberton, Jr., Acting General Counsel, Julia P. Cooper, Chief, Appellate Section, Equal Employment Opportunity Commission, on brief) for Amicus Curiae, Equal Employment Opportunity Commission.

CRAVEN, Circuit Judge:

This is a class action arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et. seq. Plaintiffs are representative members of the class composed of all Negroes employed at defendant's Roanoke Rapids plant and all Negroes who may hereafter apply for employment at the Roanoke Rapids plant. The multitude of defendants is occasioned by changes in corporate ownership which occurred subsequent to the institution of the action. Since the Roanoke Rapids operation has at all pertinent times been called the Albemarle Paper Company, the corporate defendants will hereinafter be referred to as Albemarle.

The district court found that Albemarle practiced racially discriminatory employment practices prior to July 2, 1965, and that the effect of that discrimination had been perpetuated through a job seniority system. Thus, the district court enjoined Albemarle and the defendant union, Halifax Local 425, United Papermakers and Paperworkers, AFL-CIO, from discriminating against Negro employees,

and ordered that the job seniority system be abolished and a plant-wide seniority system be implemented. There has been no appeal from these provisions of the court's decree.

The district court refused to order the abolition of or changes in the pre-employment testing procedures used by Albemarle. Plaintiffs appeal from the district court's determination. Judge Boreman concurs with Judge Craven in reversing and remanding to the district court on this issue. Judge Bryan dissents.

The district court also refused to award the plaintiffs back pay. Judge Bryan concurs with Judge Craven in reversing the district court on this issue. Judge Boreman dissents.

The effect of this division in the court is to reverse and remand the district court's determination as to the testing procedures and the refusal to award back pay.

I

Testing Procedures

Prior to 1958, no employment personnel tests were given to applicants for employment at Albemarle. In 1956, the personnel manager was requested to design a screening program for selection of employees for certain departments. In this connection, the Revised Beta Examination (Beta) and the Bennett Mechanical Comprehension were selected to test applicants. A brief study was made at that time to determine the usefulness of the Beta test.

About 1963, the then personnel manager discontinued using the Bennett Mechanical Test since it had not been studied. Use of the Wonderlic Test, A and B series, was initiated at that time. Whereas the Beta is a non-verbal test developed to measure the intelligence of illiterate and non-English speaking individuals, the Wonderlic Tests are

verbal tests of general mental ability. Use of the Wonderlic Tests was adopted in connection with the Beta because Albemarle felt it essential for new employees to have a certain level of verbal facility because of the increasing technical nature of the operation and the increasing use of printed instructions in the operation of machinery and the like.

The operations of Albemarle are, like other pulp and paper mills, organized on a departmental basis. For purposes of employee classification and promotion, each department is organized into one or more lines of progression. Entrance into each department is effected at the bottom of a line of progression and employees move up, depending on their ability and experience, as vacancies occur. In all, Albemarle has 11 separate departments containing 17 lines of progression. Since 1963, applicants for 8 of these departments and 14 of the lines of progression were required to score successfully on the Beta and Wonderlic pre-employment tests.

After the Supreme Court decision in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), Albemarle hired an expert in industrial psychology and testing to conduct a validation study of its pre-employment testing procedures. A validation study determines whether test results have a significant relationship to actual performance on the job. The technique adopted for the validation study of Albemarle's tests was concurrent validation. In concurrent validation, a sample of current employees occupying the jobs, or job groups, in question is selected. These employees are then given the tests, and the test scores compared with one or more criteria of the employees' ability to perform their jobs.

Albemarle's validation study covered 10 job groups in only 8 of the 14 lines of progression, and 5 of the 8 departments for which the tests are required. The sample of

employees was generally selected from the higher level jobs and encompassed approximately 30 percent of the different jobs for which tests are required. The test scores from that sample were compared with two supervisors' comparative ratings of employees in each job slot. The criteria for the supervisors' rating was: "Excluding a man's attitude, just how well the guy can do the job when he's feeling right." (A.471). No job analysis was done for the jobs in question.

Albemarle's expert found that one of the tests was validated for 9 of the 10 job groups studied. However, both tests were valid for only one job group.

The effect of the district court's approval of Albemarle's testing procedure is to approve a validation study done without job analysis, to allow Albemarle to require tests for 6 lines of progression where there has been no validation study at all, and to allow Albemarle to require a person to pass two tests for entrance into 7 lines of progression when only one of those tests was validated for that line of progression. We think this was error.

Title VII of the Civil Rights Act "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in action." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971). In an employment practice, though facially neutral as the testing procedures here, is shown to have a differential impact on minority employment, it is prohibited unless the employer can prove business necessity. *Griggs*, at 432. The plaintiffs made a sufficient showing below that Albemarle's testing procedures have a racial impact.[1] It was thus incumbent upon

[1] It was demonstrated in plaintiff's exhibits that on the Wonderlic Series 96 percent of whites passed as opposed to 64 percent of blacks. This corresponds with the national average as determined in a study by the authors of the test. Negro Norms, A Study of 38,452 Job Applicants for Affirmative Action Programs, E. F. Wonderlic & Assoc., Inc. (1970).

Albemarle to establish business necessity[2] by showing that its testing requirements "have a manifest relationship to the employment in question." *Griggs*, at 432. *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418, 455-57 (5th Cir. 1971).

While § 703(a)(2), (h)[3] specifically authorizes professionally developed tests not used to discriminate, *Griggs* makes clear that that section allows only those tests proven to be job related. 401 U.S. at 436. In so holding, the Court gave great deference to the interpretation of the Act evinced in a set of guidelines by the enforcing agency, the Equal Employment Opportunity Commission. *Griggs*, at 433-34. We have also recently noted with approval these guidelines. *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 798 n. 7 (4th Cir. 1971).

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[2] "[T]he applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential impact."

Robinson v. Lorillard Corp., 444 F.2d 791, 978 (4th Cir. (1971). *See also*, Note, *Employment Testing: The Aftermath of Griggs* v. *Duke Power Company*, 72 Colum. L. Rev. 900, 908 (1972).

[3] § 703(a)(2)(h) provides in relevant part:

> "Notwithstanding any other provisions of this subchapter, it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin."

42 U.S.C.A. § 2000e-2(h).

We think Albemarle has failed in several respects to show that its tests are job related, have a manifest relationship to employment, and have been validated in accordance with EEOC guidelines.

In developing criteria of job performance by which to ascertain the validity of its tests, Albemarle failed to engage in any job analysis. Instead, test results were compared with possibly subjective ratings of supervisors who were given a vague standard by which to judge job performance. Other courts have expressed skepticism about the value of such ill-defined supervisor appraisals. *See, e.g., Rowe* v. *General Motors Corp.*, 457 F.2d 348, 452 (5th Cir. 1972). Also Cooper and Sobol have stated in their article, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598, 1662 (1969):

> Supervisory ratings, for example, which are possibly the single most common performance measure used in validity studies, are subject to personal prejudice. When test scores are correlated with such ratings, the validation, if it can be called that, is of questionable value and may simply prove that the test has the same bias as the supervisors.

Likewise, in this regard the EEOC guidelines provide:

> (3) The work behaviors or other criteria of employee adequacy which the test is intended to predict or identify must be fully described; and, additionally, in the case of rating techniques the appraisal form(s) and instructions to the rater(s) must be included as part of the validation evidence. Such criteria may include measures other than actual work proficiency, such as training time, supervisory ratings, regularity of attendance and tenure. Whatever criteria are used they must represent major or critical work behaviors as revealed by careful job analysis.
>
> (4) In view of the possibility of bias inherent in subjective evaluation, supervisory rating techniques

> should be carefully developed, and the ratings should be closely examined for evidence of bias.
>
> . . .
>
> 29 C.F.R. § 1607.5(b) (1970).

We agree that some form of job analysis resulting in specific and objective criteria for supervisory ratings is crucial to a proper concurrent validation study. *See, Western Addition Community Organization* v. *Alioto*, 340 F.Supp. 1351, 1354-55 (N.D. Cal. 1972). To require less is to leave the job relatedness requirement largely to the good faith of the employer and his supervisors. The complaining class is entitled to more under the Act.

Even if the validation procedures had been proper, it was error to approve the testing procedures for lines of progression where there had been no validation study. In this case the tests were approved as a requirement for 6 lines of progression for which the tests had not been validated. While it is true that a test need not always be validated for each job for which it is required, there are narrow limits on when a test may be used without validation. The EEOC guidelines provide:

> (2) Where a test is to be used in different units of a multiunit organization and no significant differences exist between units, jobs, and applicant populations, evidence obtained in one unit may suffice for the others. 29 C.F.R. § 1607.4(c) (1970).

In this case, a failure to perform job analyses in the lines of progression involved in the validation study and in the other lines of progression for which the tests are required prevents concluding that no significant differences exist in the jobs in question.[4]

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[4] The appellants also question the validity of the validation study because the employees tested were primarily from higher level, rather than entry level, positions. As pointed out by the EEOC guidelines, 29 C.F.R. § 1607.4(c)(1) (1970), such a validation

Not only was it error to approve the testing procedures for lines of progression not validated, but it was also error to approve requiring applicants to pass two tests for positions where only one test was validated. Albemarle seeks to justify this under the business necessity rule. Albemarle originally hires all employees into a pool. From this pool the employees move into a line of progression as vacancies occur. Since it is not known into which line of progression an employee will be placed, Albemarle asserts there is nothing wrong with requiring all employees to be qualified for any line.

Albemarle has not shown that hiring all employees into a pool is necessary to the safe and efficient operation of its business, nor has it shown that hiring employees for specific lines of progression is not an acceptable alternative. This they were required to prove to justify their policies under the business necessity test. *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir. 1971).

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technique is permissible only where new employees will progress to the higher level "within a reasonable time and in a great majority of cases." As stated by Cooper & Sobol, *Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598, 1649 (1969):

> In addition, the problems inherent in test use are compounded by the fact that the higher level jobs may not be reached for several years, during which time an employee may improve his capabilities. This possibility seems particularly likely in the case of an individual whose potential has been artificially suppressed through discrimination, in education and otherwise. In order for a promotability interest to justify test use, therefore, it is essential that the test have been properly evaluated and shown to be predictive of performance at some job level to which promotions can be expected in the reasonable future.

In *Griggs* the Court failed to reach the question of whether a testing procedure which takes into account higher level job requirements is permissible. 401 U.S. at 432. We likewise fail to reach this question because of insufficient evidence below as to the time in which it takes an employee to progress to higher level jobs.

Thus we hold that the district court erred in upholding the validity of the pre-employment personnel tests and in refusing to enjoin their use.

II

Back Pay

Title 42 U.S.C. § 2000e-5(g) provides in relevant part:

> The court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay . . . .

The district court found that Albemarle had practiced discriminatory employment practices and that these practices had been perpetuated through a job seniority system. Consequently, the district court enjoined Albemarle and the defendant union, Halifax Local 425, from continuing the discriminatory practices. Nevertheless, the district court, finding an award of back pay to be within his discretion, refused to award back pay to the complaining class. The reasons given by the district court for refusing such an award were that the claim for back pay was filed nearly five years after the institution of the action, and that there was no evidence of bad faith noncompliance with the Act. Neither of these is sufficient to justify the district court's refusal to award back pay.

In *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971), a case which also dealt with a seniority system which perpetuated past discriminatory practices, the defendants made the contentions presented to us here.

> The complaint filed by the plaintiffs in the District Court did not specifically request an award of back pay . . . . At a pretrial hearing concerning the appropriateness of a class action, one of the lawyers for the plaintiffs clearly indicated that the suit was one for

> injunctive relief rather than recovery of lost wages. It was not until well after trial of the case, though before the judge had entered a decision, that a request was made for additional relief in the form of back pay for the class.

444 F.2d at 802-03. In *Robinson*, as here:

> [B]ecause the obligation to provide back pay stems from the same source as the obligation to reform the seniority system, any general defenses relevant to the back pay award were equally relevant to the suit for injunctive relief . . . . The defendants have in no way been prejudiced by the belated claim.

444 F.2d at 803.

Other courts have held likewise. The Fifth Circuit held, in *United States* v. *Hayes Int'l Corp.*, 456 F.2d 112 (1972), that the broad aims of Title VII require that the issue of back pay be fully developed and determined even though it was not raised until the post-trial stage of litigation.

Also, the Seventh Circuit, in a case which was not a class action, remanded the case in order that " 'relief should be made available to all who were so damaged whether or not they filed charges and whether or not they joined in the suit.' " *Sprogis* v. *United States Air Lines, Inc.*, 444 F.2d 1194, 1202 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971).

In *Robinson* the argument was also made that back pay should not be awarded where the defendant had acted in good faith. Put negatively, the argument, urged by Albemarle, is

> that back pay should not be awarded in the absence of a specific intent to discriminate. A corollary argument is that the award was improper in light of the unsettled state of the law. The principal answer to both points is that back pay is not a penalty imposed as a sanction for moral turpitude; it is compensation

> for the tangible economic loss resulting from an unlawful employment practice. Under Title VII the plaintiff class is entitled to compensation for that loss, however benevolent the motives for its imposition.

444 F.2d at 804. *See also, Johnson* v. *Goodyear Tire & Rubber Co.*, — F. Supp. —, 5 FEP Cases 32 (S.D. Tex., August 10, 1972) (also a seniority case where good faith was present).

The only significant difference between *Robinson* and the present case is that in *Robinson* the district court had awarded back pay and the district below refused to award back pay. The question then is whether, in light of the broad aims of Title VII, this court may affirm the opposite result as to back pay on similar factual situations because such award rests in the discretion of the district judge.

"Discretion in a legal sense necessarily is the responsible exercise of official conscience on all of a particular situation in the light of the *purpose for which the power exists.*" *Bowles* v. *Goebel,* 151 F.2d 671, 674 (8th Cir. 1945) (emphasis added). Thus in determining the proper scope of the exercise of discretion, the objective sought to be accomplished by the statute must be given great weight. *Hecht Co.* v. *Bowles,* 321 U.S. 321, 331 (1944). Where a district court fails to exercise discretion with an eye to the purposes of the Act, it must be reversed. *Wirtz* v. *B. B. Saxon Co.,* 365 F.2d 457 (5th Cir. 1966); *Schultz* v. *Parke,* 413 F.2d 1364 (5th Cir. 1969).

"The clear purpose of Title VII is to bring an end to the proscribed discriminatory practices and to make whole, in a pecuniary fashion, those who have suffered by it." *Bowe* v. *Colgate-Palmolive Co.,* 416 F.2d 711, 720 (7th Cir. 1969). In light of the congressional purpose, courts should give "a wide scope to the act in order to remedy, as much as possible, the plight of persons who have suffered from discrimination in employment opportunities." *Rowe* v.

General Motors Corp., 457 F.2d 348, 354 (5th Cir. 1972).

Also, as we stated in Robinson, "[t]he back pay award is not punitive in nature, but equitable—intended to restore the recipients to their rightful economic status absent the effects of the unlawful discrimination." 444 F.2d at 802. See also, *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969).

Because of the compensatory nature of a back pay award and the strong congressional policy embodied in Title VII, a district court must exercise its discretion as to back pay in the same manner it must exercise discretion as to attorney fees under Title II of the Civil Rights Act. *See Bowe, supra*, at 719. Thus, a plaintiff or a complaining class who is successful in obtaining an injunction under Title VII of the Act should ordinarily be awarded back pay unless special circumstances would render such an award unjust.[5] *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400 (1968). *See Bowe, supra* at 719-20.

Because there are no such special circumstances here, on remand the district court should include an award of back pay in its order. It is to be remembered, of course, that a back pay award is limited to damages which are actually suffered. *Lea* v. *Cone Mills Corp.*, 438 F.2d 86 (4th Cir. 1971).

REVERSED

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[5] For examples of such special circumstances said to justify refusal of a back pay award, *see* Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002 (9th Cir., June 20, 1972); Le Blanc v. Southern Bell Tel. & Tel. Co., 333 F. Supp. 602, 610-11 (E.D. La. 1971), *aff'd, per curiam*, 460 F.2d 1228 (5th Cir. 1972).

BOREMAN, Senior Circuit Judge, concurring in part and dissenting in part:

I am in agreement with the result reached by Judge Craven in that portion of his opinion which holds that Albemarle Paper Company has failed to show a business relationship between the racially biased tests administered to prospective employees, and its personnel requirements. However, from that portion of his opinion reversing the district court's refusal to award back pay, I must respectfully dissent.

The appellants advance multiple theories in their effort to persuade this court to modify the relief granted below to include an award of back pay. The two arguments approved and adopted by Judge Craven are: first, the equation of § 706(g) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g), with § 706(k) of the Act, 42 U.S.C. § 2000e-5(k), which provides for an award of attorney's fees in the discretion of the court and under which the federal courts have held attorney's fees are to be awarded as of course,[1] in the absence of "special circumstances;" and second, that failure to grant back pay was an abuse of discretion under *Robinson* v. *Lorillard,* 444 F.2d 791 (4 Cir. 1971).

In *Lea* v. *Cone Mills,* 438 F.2d 86, 88 (4 Cir. 1971), this court, over my strenuous objections stated in dissent, extended the holding of the Supreme Court in *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400, 402-403 (1968), that attorney's fees should ordinarily be granted in suits under Title II of the Act,[2] to include suits under Title VII as well. A study of the relevant sections and the reasoning behind the *Newman* and *Lea* decisions reveals the fallacy of a comparison between to provision for attorney's fees and for back pay.

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[1] Lea v. Cone Mills, 438 F.2d 86, 88 (4 Cir. 1971).

[2] *Accord,* Wooten v. Moore, 400 F.2d 239, 242 (4 Cir. 1968).

The pertinent provisions with respect to the allowance of attorney's fees under Title II and Title VII are virtually identical, and each was considered by Congress as sufficiently significant to be expressed in an individual subsection.[3] However, the grant of authority to award back pay is found in a completely different subsection of Title VII, the congressional separation of these two provisions indicating an intent to treat them independently. Furthermore, the subsection in which the provision for back pay is found generally sets out the equitable remedies which the district court may utilize in fashioning relief should the complaining party prevail, indicating no congressional intent to give an award of back pay any greater presumption of appropriateness than its companion remedies.[4]

More significant, however, is the reason for which the district courts' discretion was found to be limited with respect to the award of attorney's fees to prevailing parties plaintiff. In bringing an action against an employer (or manager of a public accommodation under Title II) for discrimination in the operation of his business, the plaintiff is more than a private party litigant; he acts as a "private attorney-general" in vindicating the interests of

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[3] Title II, 42 U.S.C. § 2000a-3(b):

> (b) In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person.

Title VII, 42 U.S.C. § 2000e-5(k):

> (k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

[4] The authorities generally deal with injunctive relief as within the discretion of the district courts. *E.g.* Sprogis v. United Air Lines, 444 F.2d 1194, 1202 (7 Cir. 1971).

the public, and it is this advancement of the commonweal that is the basis for allowing attorney's fees as of course.[5] Such a public purpose is not present in the more delicate task of fashioning the appropriate equitable relief to fit the peculiar fact pattern of each case, and the monetary award is intended to redress purely private inequities.[6]

I must conclude, therefore, that the award of back pay, unlike the grant of attorney's fees, is an element of affirmative relief which has been entrusted to the more general discretion of the district courts.[7]

Judge Craven's opinion also apparently adopts the view that this court's decision in *Robinson* v. *Lorillard, supra,* stands for the proposition that under facts similar to those in *Robinson,* it would be an abuse of the district court's discretion to deny a request for back pay. Such a construction misinterprets the holding in *Robinson* and the proper scope of appellate review of discretionary decisions. The burden of persuasion falls on the party attempting to show an abuse of discretion and not on the successful party below.[8] In *Robinson* the holding of this court was that the appellant company failed to show, under the factual situation before the district court, that it was an abuse of

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[5] Lea v. Cone Mills, 438 F.2d 86, 88 (4 Cir. 1971). *See* Jenkins v. United Gas Corp., 400 F.2d 28, 32 (5 Cir. 1968). *Developments in the Law-Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 84 HARV.L.REV. 1109, 1254 (1971).

[6] *See,* Austin v. Reynolds Metals, 327 F. Supp. 1145, 1153 (E.D. Va. 1970).

[7] *E.g.,* Schaeffer v. San Diego Yellow Cabs, 462 F.2d 1002, 1006 (9 Cir. 1972); LeBlanc v. Southern Bell Tel. & Tel., 460 F.2d 1228, 1229 (5 Cir. 1972); United States v. Dillon Supply Co., 429 F.2d 800, 804 (4 Cir. 1970); Johnson v. Georgia Highway Express, 417 F.2d 1122 1125 (5 Cir. 1969). *Developments in the Law-Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 84 HARV.L.REV. 1109, 1265 (1971).

[8] LeBlanc v. Southern Bell Tel. & Tel., 460 F.2d 1228, 1229 (5 Cir. 1972).

discretion *to award* back pay, not that back pay was mandated under those circumstances. The term "discretion"[9] denotes that more than one acceptable alternative is available and the choice of the most appropriate is properly left in the hands of the district courts which are more intimately involved with the ambiance of the cases and the merits of each position than are the Courts of Appeal.[10]

> "'*We must keep in mind that the discretion is to be exercised by the district court and not by a court of review. This court should not substitute its discretion for that of the district court.*'" (Emphasis supplied by *Larson.*) *Larson* v. *United States,* 296 F.2d 167, 170 (8 Cir. 1961).

The first reason assigned by the district court for its refusal to award back pay—that there was no evidence of bad faith noncompliance with the Act as evidenced by the active recruitment of Negroes into the company's training program for certain skilled lines of progression as early as 1964, the company-initiated merger of some lines of progression to increase advancement opportunities and

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[9] The Supreme Court has defined "discretion" as follows:

> The term "discretion" denotes the absence of a hard and fast rule. . . . When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result.

Langnes v. Green, 282 U.S. 531, 541 (1931).

[10] United States v. Dillon Supply Co., 429 F.2d 800, 804 (4 Cir. 1970):

> The government has urged us to remand with directions to enter specific injunctive relief. After careful consideration we have concluded to deny this request. The fashioning of effective and appropriate injunctive relief depends in part on the discretion of the district court. The function of the courts of appeal is to review the relief which the district court grants in light of findings and the supporting record and to determine if there has been an abuse of disretion.

good faith attempts to validate its testing procedures—[11] is not sufficiently compelling, in and of itself, to support a denial of back pay. In *Robinson* this court made clear that the remedy of back pay is not in the nature of a punishment but is an equitable measure to restore those discriminated against to their proper economic position had the complained of actions not occurred.[12] This is not to say, however, that the good faith of the company may never be taken into account in considering and determing the proper relief to be granted.[13] Should there exist equitable factors of which the district court may properly take cognizance, and which are supportive of a decision to deny back pay, then innocence and good faith efforts on the part of the employer may be factors to be weighed in the balancing of equities.

Some insight into the proper application of that equitable balancing power may be gained from an examination of the third argument advanced by the appellants, a comparison of § 706(g) with § 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c). In the case of *Phelps Dodge* v. *N.L.R.B.*, 313 U.S. 177 (1941), which was decided under § 10(c), the Labor Board had ordered reinstatement of a discriminatorily discharged employee together with a full award of back pay, although the employee had not earned wages during the period of his lay-off. In remanding to the Board for modification in light of the principle of mitigation of damages, the Supreme Court stated:

> [T]he advantages of a simple rule must be balanced against the importance of taking fair account, in a

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[11] In 1963 the company discontinued the use of the Bennett Mechanical Comprehension Test, which is regarded to be racially biased (See Cooper and Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV.L.REV. 1598, 1641 n. 16 (1969)) in favor of Wonderlic A & B tests.

[12] 444 F.2d 791 at 802, 804.

[13] *See*, Schaeffer v. San Diego Yellow Cabs, 462 F.2d 1002, 1006-7 (9 Cir. 1972).

> civilized legal system, of every socially desirable factor in the final judgment. The Board, we believe, overestimates administrative difficulties and underestimates its administrative resourcefulness. Here again we must avoid the rigidities of an either-or rule. The remedy of back pay, it must be remembered, is entrusted to the Board's discretion; it is not mechanically compelled by the Act. And in applying its authority over back pay orders, the Board has not used stereotyped formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations. (313 U.S. at 198.)

The primary factor given by the district court in the instant case was prejudice to the interests of the company arising from representations made by the appellants in their status as plaintiffs below. During the early stages of this case, the company moved for Summary Judgment and in replying to that motion,[14] the plaintiffs set out the limits of the relief sought:

> It is important to understand the exact nature of the class relief sought by plaintiffs. No money damages are sought for any member of the class not before the court, nor is specific relief in the way of job changes, promotions or the like being sought for any member of the class not before the court. The only relief sought for the class as a whole is that defendants be enjoined from treating the class as a separate group and discriminating against the class as a whole in the future....
>
> ....
>
> [T]he matter of specific individual relief for other class members is not before this Court.

Judge Craven in the majority opinion erroneously characterizes the prayer for back pay as merely a tardy request, when as illustrated above, it in fact was a reversal of express representations made three and one-half years

[14] The answer was filed on November 22, 1966.

prior to the request for additional relief.[15] This situation is plainly distinguishable from *Robinson*, in which the oral representation by counsel for the plaintiffs that no monetary relief was sought was made at pre-trial conference. The prejudice to Albemarle stemmed not from a failure of defenses, with which this court was concerned in *Robinson*, but from the unconscionably long delay between the express disclaimer and the unindicated, abrupt reversal of position.

Rule 54(c), Federal Rules of Civil Procedure, provides that the federal courts "shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party in whose favor it is rendered has not demanded such relief in his pleadings," but this is not the ordinary case of a mere failure to request a specific form of relief; here there was an express and formal disclaimer of intention to seek that particular remedy. An opposing party should be permitted to rely on such a statement, and to the extent that in relying thereon he has acted to his detriment,[16] Rule 54(c) does not mandate the grant of the contested award.[17]

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[15] The request was first communicated to the company on June 4, 1970.

[16] Illustrations of the detriment arising from the reliance of the defendants upon the express disclaimer by the plaintiffs of their intention to seek back pay for members of the class generally, were argued before the district court at pre-trial conferences: (1) The extensive period of time taken for prosecution of the suit exposed the defendants to the unexpected hazard of a potentially enormous award, unavailable for consideration during their continued efforts to arrive at a settlement, and which threatened the financial viability of the defendant paper mill. (2) During the hiatus with respect to the back pay claim, the paper mill was sold by the defendant Ethyl Corp. to the defendant Hoerner-Waldorf Corp., with the transfer agreement taking express notice of the pendency of suit, a strong indication of the impact the status of that suit had upon the deliberations of the principals. (3) The inordinately long delay tended to preclude the defendants from adequately preparing a defense to individual claims, due to the impossibility or impracticality of deposing witnesses and claimants nearly five years after the occurrences of events of which plaintiffs complain.

[17] Rental Development Corp. v. Lavery, 304 F.2d 839, 842 (9 Cir. 1962).

More importantly, Rule 54(c) is merely the vehicle by which the party is to obtain the "relief to which he is entitled." The relief and the entitlement thereto are to be determined by the district court under § 706(g), and Rule 54(c) cannot compel the grant of relief which is within the discretion of the district court. The court below did not base its refusal to award back pay on the failure to request such relief pursuant to Rule 8(a), F.R.Civ.P., but by virtue of its discretionary powers under § 706(g); the source of the claim of authority for granting the award sought is the very source relied upon by the court below to deny the request.

I do not find it possible to say that the reasons assigned by the district court in support of its decision not to award back pay show an abuse of discretion, and I would therefore affirm the decision below. Under the circumstances here I would not be willing, in any event, to go beyond a direction to the district court to investigate the propriety of awarding back pay with respect to those named plaintiffs actually before the court since the representations of the appellants in their Memorandum in Opposition to Summary Judgment explicitly indicate an intent to seek affirmative, individual monetary relief only for themselves, a relatively small group, and for no others.

* * * * * * * * * *

Purdue University for statistical correlation. The District Judge found:

> "35. The results of the validation study, presented both in statistical and graphical form, showed positive correlations of a statistically significant nature for nine of the ten specific job groupings...."

The expert advised that "the company utilize these tests for its initial hiring", observing, however, that "no test or set of tests will validate for all jobs." With this evidence in

mind, I look to the errors ascribed in Judge Craven's opinion to the District Court's refusal to direct Albemarle to abolish or change its testing procedures.

I. First, I cannot agree that the employer did not validate the tests and relate them to the jobs in *all* the lines of skilled employment. The District Judge found otherwise, saying: "The group tested was typical of employees in the skilled lines of progression". This, for me, is a conclusion that the groups tested fairly exemplified the remaining groups and also fairly represented the qualifications existing in *all* the skilled lines. This reading of his factual findings is reinforced by his later statement: "The *personnel* tests administered at the plant have undergone validation studies and *have been proven* to be job related". (Accent added) This statement, I understand, encompasses all the groups at the plant, whether tested directly or by sample. Such a method of testing in a multiunit organization is, as noted by Judge Craven, approved by the Guidelines of Employee Selection Procedures, supra, § 1607.5.

The breadth of the expert's survey is described in his report as follows:

> "General Summary:
>
> "Inspection of the correlations and charts shown in this report shows quite conclusively that both the Beta and Wonderlic A tests *can be reasonably used for both hiring and promotion for most of the jobs in this mill.*... The EEOC could not reasonably object to these standards in the light [of] the validation data covered in this report." (Accent added.)

Secondly, in view of the findings by the Court that validation studies had been applied to the personnel tests and that the tests had been proved to be job related, I cannot join in the determination that discrimination resulted from the absence of "job analyses". It seems to me that these findings necessarily recognize that the equivalent of "job

analysis'' was utilized. In rating the employees, the jobs' features were undeniably considered, for the supervisors were unquestionably familiar with these elements.

Thirdly, also unwarranted, it seems to me, is criticism of the District Court's acceptance of the company's practice of ''requiring applicants to pass two tests for positions where only one test was validated''. The two are the Beta and Wonderlic. Beta (non-language) measures merely native intelligence, while Wonderlic (verbal) tests reading ability. The District Court justifies its approval of Albemarle's utilizing, both tests because it was a business necessity. The Court found that the complexity of Albemarle's newly adopted machinery made reading an absolute requirement for the safe and efficient operation of the machines and called for employees ''with a high level of native intelligence''. A personal inspection of the machinery revealed the intricacy to the judge.

Each of these aptitude tests is ''demonstrably a reasonable measure of job performance''. *Griggs*, at 436. Thus they are their own proof of their validation. My understanding is that a test cannot be declared discriminative if it searches for an indispensable factor of a job. *Griggs*, supra, at 431.

It does not appear from the District Judge's finding that low scores on one or both tests would bar all applicants for employment. Decisions on employment in non-technical areas are apparently not made solely upon test results, but include such considerations as experience, references and interviews.

In my judgment the District Judge, in regard to the testing requirements, exercised a cautious solicitude, both for the employees' entitlements and the employer's obligations under the Civil Rights Act of 1964. His injunction against a high school education as a job prerequisite and

against the use of job seniority instead of plant seniority removed the employees' sustainable grievances. Ten days were devoted to the hearing of the case—July 26 to August 5, 1971. With this industry and application, along with the knowledge of the rigors of *Griggs,* as well as of the EEOC guidelines, the District Judge did not, to my mind, omit or deviate in any significant degree from the Act. It must be remembered, throughout, that the three items of the District Judge's determination just enumerated constitute findings of fact, and I cannot say they are clearly erroneous.

II. Lastly, recovery was asked by the plaintiffs for "the amount of pay which would have accrued to the employees had there been no unlawful practice". Under the Act, 42 U.S.C. 2000e-5(g), back pay may be ordered in accompaniment of an injunction—and only then—against an employer who has engaged in "an unlawful employment practice" and has done so "intentionally".

As Judge Craven notes, the District Court found that "Albermarle has practiced racially discriminatory employment . . . prior to July 2, 1965 and that the effect of this discrimination had been perpetuated through a job seniority system". Accordingly the Court issued an injunction, pursuant to the Act, against the maintenance of this discrimination, terming it "an unlawful employment practice" and concluding that it had been committed "intentionally". No objection was made by the employer to this finding and conclusion, and no appeal taken from the injunctive order. Indeed, in the oral argument of the appeal the appellee-defendants conceded that the District Judge had indeed stated this conclusion on "intentionally".

For this reason I think back pay lost by an employee through the company's resort to job-seniority should be recovered. Of course, the reimbursable loss must be proved

to be the direct result of the invidious practice and, as Judge Craven admonishes, the grant of monetary relief is not to exceed the "damages which are actually suffered".

CONCLUSION

In sum, as set forth in Part I hereof, I dissent from Part I of Judge Craven's opinion; but I concur with the award, in his Part II, of back pay insofar as it is granted for loss occasioned by the job seniority practice, as explained in my Part II.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILSON DIVISION

JOSEPH P. MOODY, ET AL., *Plaintiffs*

v.

ALBEMARLE PAPER COMPANY, A Virginia Corporation, ET AL., *Defendants*

AND

ALBEMARLE PAPER COMPANY, A Delaware Corporation; HOERNER WALDORF CORPORATION, A Delaware Corporation; FIRST ALPACO CORPORATION; and ETHYL CORPORATION, A Virginia Corporation, *Additional Defendants.*

Civil No. 989

Memorandum Opinion and Order

Plaintiffs brought this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., on their own behalf and on behalf of other Negroes similarly situated, alleging violations by their employer and their local union of their rights to equal employment opportunities. Jurisdiction is vested in this court by the Act and by 28 U.S.C. § 1343.

The named plaintiffs are citizens of the United States and of the State of North Carolina, residing in Halifax County, North Carolina. On July 15, 1971, this court entered an order allowing the action to be prosecuted as a class action under Rule 23 of the Federal Rules of Civil Procedure, and the class was defined as (1) all Negroes employed at the Roanoke Rapids plant of Albemarle Paper Company as of June 30, 1967; (2) all Negroes employed at said plant after June 30, 1967, except those whose initial permanent positions were not job classifications limited to or predominantly staffed by Negroes; and (3) all Negroes who

may hereafter apply for or be employed at said Roanoke Rapids plant who may be affected by the alleged racially-discriminatory employment practices of the defendants.

The alleged discriminatory employment practices have occurred at a pulp and paper plant in Roanoke Rapids, North Carolina. The multitude of defendants is explained by changes in the corporate ownership of the plant which have occurred since the institution of this action more than five years ago. However, the operation at Roanoke Rapids has at all pertinent times been called the Albemarle Paper Company and, therefore, for purposes of discussion, unless clarity otherwise dictates, such operation will be referred to as "Albemarle".

The action encompasses all aspects of the hiring and promotion practices within the Roanoke Rapids facility and the application of the provisions of the collective bargaining agreements entered into by it with the defendant Union. The essential issues relate to the educational and testing requirements for employment and promotion utilized at the plant and the effects of the "job seniority" system embodied in the respective union contracts.

This cause was tried by this court without a jury, and having considered the evidence, briefs, oral arguments and the voluminous five-year accumulation of pleadings and other court papers, the court makes the following

FINDINGS OF FACT

1. On May 9, 1966 the named plaintiffs filed charges against Albemarle, Halifax Local No. 425 and United Papermakers and Paperworkers, AFL-CIO (United Papermakers) before the Equal Employement Opportunity Commission (EEOC) pursuant to the provisions of Section 706(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(a). These charges raised the issues set forth in the complaint filed with this court.

2. Plaintiffs received letters dated July 28, 1966 from EEOC notifying them that they were entitled to file suit in federal district court under Title VII of the Act. The complaint in this action was timely filed on August 25, 1966.

3. The paper mill was built in 1907 and it began business under the name of Halifax Paper Company. In 1937 a Virginia corporation, Albemarle Paper Company, acquired the plant. Albemarle Paper Company (Virginia), a wholly owned subsidiary of the defendant Ethyl Corporation, operated the plant at the time this action was filed. On October 31, 1968, the paper mill was transferred to defendant Albemarle Paper Company, a Delaware corporation. Albemarle Paper Company (Delaware) is a wholly owned subsidiary of defendant Hoerner Waldorf Corporation, a Delaware corporation. Albemarle's (Virginia) name was changed to First Alpaco Corporation and thereafter was merged into defendant Ethyl Corporation.

4. There has been a continuation of the business in substantially the same manner in which the business was operated prior to the transfer on October 31, 1968; the plant location is the same; the work force is substantially the same; the jobs and working conditions are substantially the same; the method of production is substantially the same; the products and services provided are substantially the same; and the machinery and equipment are substantially the same.

5. Albemarle is a leading employer in the Roanoke Rapids area. It pays higher wages than most, if not all, industries in the area.

6. At all pertinent times the Albemarle facility at Roanoke Rapids has been an empoyer in an industry affecting interstate commerce and has more than 100 employees.

7. Defendant Local No. 425 (hereafter referred to as the "Union") is a labor organization which is and has been a party to collective bargaining agreements with Albemarle pertaining to production and maintenance employees at the Roanoke Rapids plant and negotiates on their behalf concerning the wages, terms and conditions of employment with respect to those employees. The Union is a labor organization within the meaning of Section 701(d) and (e) of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e(d) and (e).

8. The operations of Albemarle, as is characteristic of pulp and paper mills throughout the United States and Canada, are organized on a departmental basis in accordance with the type of work performed in each department. The jobs within each department generally require skills and ability which differ from one department to another and each department has a specific function of its own in the overall operations of the mill. For purposes of employee classification and promotion, each of the departments is organized into one or more "lines of progression". In all but exceptional circumstances, entrance of new employees into each department is effected at the lowest-paying, least responsible job of the lines of departmental progression and vacancies are filled by promotions within the lines.

9. There are over 100 different jobs at the Roanoke Rapids plant ranging from Janitorial to Complex Machine Operator. Of these, approximately 86 are jobs traditionally reserved for white persons ranging from jobs of Helper and Laborer to Machine Operator.

10. Promotion and demotion within a line of progression is governed by seniority and ability. The 1965 and 1968 labor agreements provide in part that "when all factors that constitute ability are relatively equal, then seniority in keeping with established lines of progression within a given department shall prevail".

11. Thus, the seniority system utilizes "job seniority" for promotions and demotions. This means that the employee who has the greater seniority in the job within the line of progression immediately below the vacancy to be filled would normally be given the first opportunity to fill the vacancy even though other employees in the same job classification have more plant and departmental seniority, assuming that the person has the necessary ability, experience and training to do the higher job.

12. When a layoff occurs within a line of progression or department, the employees bump downward and the most junior employees are either laid off or offered Call Board work. Employees who are returned to the Call Board or are laid off retain their seniority rights in their former department and line of progression, but do not have a seniority preference to an opening in a different department or line of progression.

13. A 1965 labor agreement provided that employees could request transfers from one department (or line of progression) to another department (or line of progression). This provision was contained in the labor agreements prior to 1965. Whether or not the transfer was granted was within the sole discretion of the company. If an employee transferred at his own request, his seniority in his former department or line of progression ceased immediately unless within thirty days the employee returned to his former department or line of progression because of his health or physical condition. When the transfer was effected at the request of the company, his seniority in the department (or line of progression) left would be retained for a period of six months from the date of transfer. An employee transferred would, therefore, enter at the bottom job in the line of progression and would suffer a reduction in pay if that job to which he was permitted to transfer carried a rate of pay less than the job from which he had transferred.

14. This provision was amended by the 1968 labor agreement to read:

"10.2.1 Employees who wish to transfer from one department (or line of progression) to another may file through their foreman with the Personnel Department of the Company written application stating the department (or line of progression) and the job therein to which he wishes to be transferred. The decision of the Company in granting or denying such request for transfer is to be final. However, when an employee transfers from one department (or line of progression) to another upon his own request, his seniority in the department (and line of progression) left shall cease immediately unless within thirty (30) days from the date of such transfer the health or physical condition of such employee makes it advisable to transfer him back to the department (or line of progression) left. Where the transfer is effected at the request of the Company, his seniority in the department (or line of progression) left shall be retained for a period of six months from date of transfer.

"10.2.2 When the Company grants a transfer as described in 10.2.1, then the transferred employee will be vested with department and job seniority equal to that held in his last job or equal to that held in the lowest job in the line of progression from which transferred.

"10.2.3 When the Company grants such a transfer as described in 10.2.1, then the transferred employee will be paid his present rate if higher than the rate of the job to which transferred until such time as the employee progresses to a job in the new line of progression which pays as much or more than his rate in his last classification in his former line of progression. An employee who is permitted to carry a higher rate to another department or line of progression shall have such rate reduced to the rate of the job to which he is transferred if the employee is deemed at the time a "permanent' vacancy occurs in the next higher job in the new line of progression to be unqualified for such job, or with the Company's approval declines a promotion to such a job. Such an employee shall not

lose his 'red circle' rate if deemed unqualified and the sole reason for his lack of qualification is a determination by the Company that he has not had sufficient time in the new line of progression to obtain the training and experience necessary for promotion. In applying Section 10.2.1, if the Company decides to fill a vacancy by transferring an employee who has made application pursuant to the foregoing provisions and there are on file more than one such application for the job opening, then the Company will offer the transfer to the senior qualified employee making application."

The rate retention provision referred to in Section 10.2.3 is commonly known as "red circling".

15. Prior to January 1, 1964, Albemarle's lines of progression were strictly segregated on the basis of race. Those lines of progression to which black employees were traditionally assigned were lower paying than the "white" lines of progression. The racial identifiability of jobs and departments in lines of progression were maintained subsequent to the effective date of Title VII (July 2, 1965). As of June 30, 1967, the racial composition of jobs, departments and lines of progression were as follows:

A. *Wood Yard Department*	*Negro*	*White*
YARD CREW		
Crane Operator (Large)	0	9
Long Log Operator	0	4
Log Stacker Operator	0	4
Small Equipment Operator	0	4
Bulldozer Operator	0	1
Oiler	0	4
Chip Unloader	1	3
Chain Operator	0	4
Chipper Operator No. 2		
Chipper Operator No. 1	4	0
Tractor Operator	5	0
Chip Bin Operator	4	0
Laborers	12	0
Knife Grinder*	0	1

	Negro	*White*
SERVICE CREW		
Dempster-Dumpster	1	0
Winch Truck Operator	3	0
Winch Truck Operator Helper	1	0
Laborer	6	0
B. *Pulp Mill Department*		
Digester Operator	0	4
Stock Room Operator	0	4
Stock Room First Helper	0	4

* The Knife Grinder is in the Wood Yard Department but is not in a line of progression. This position is occupied by a white person.

Kamyr Operator	0	4
Stock Room Second Helper	0	4
Lead Loader-Blower	0	4
Loader	0	10
CE Recovery Operator	0	4
First Helper No. 6	0	4
Second Helper	0	4
Caustic Operator	0	4
Lime Kiln Operator	0	4
General Utility Operator	0	1
By Products Operator	0	2
Payloader	1	0
Lancer	4	0
Salt Cake Man	1	0
Janitor-Dead End Job	1	0
C. *A Paper Mill Department*		
PAPER MACHINE LINE OF PROGRESSION		
Machine Tender No. 1	0	4
Machine Tender No. 2	0	4
Back Tender No. 1	0	4
Third Hand No. 1	0	4
Third Hand No. 2	0	4
Fourth Hand No. 1	0	4
Fourth Hand No. 2	0	4
Front Plugger No. 1	0	4

	Negro	*White*
Back Plugger No. 1	1	4
Back Plugger No. 2	0	4
Beaterman	0	4
First Helper	0	4
Brokeman	4	0
Stock Puller	0	0
Laborer	1	0
D. *B Paper Mill Department*		
Machine Tender	0	8
Back Tender	0	8
Third Hand	0	8
Fourth Hand	0	8
Fifth Hand	0	8
Sixth Hand	0	8
Seventh Hand	0	4
Spare Hand	1	5
Janitor-Dead End Job	5	0
Stock Room Operator	0	4
Stock Room First Helper	0	4
Stock Room Second Helper	0	4
E. *Product Department B Papermill*		
Sheeter Operator	0	2
Rewinder Operator (large)	0	4
Rewinder Operator Helper (large)	0	4
Rewinder Operator (small)	0	4
Sheeter Operator Helper	0	4
Wrapper, Tier, Capper	1	16
Rewinder Plugger	1	2
Core Cutter	0	2
Janitors	3	0
Scale Clerk	0	5
Lift Truck Operator	0	13
Utility Man	0	8
Laborers	0	6
F. *A Mill Finishing Department*		
Lead Loader	1	0
Lift Truck Operator	1	0
Lead Tier & Wrapper	1	0
Wrapper, Loader & Brokeman	2	0

	Negro	*White*
G. *Boiler Department*		
Boiler Operator	0	4
H. Power Plant Department		
Power Plant Operator	0	4
First Helper	0	4
Second Helper	0	4
Utility Man	0	4
I. Technical Service Department		
B Mill Shift Testman	0	4
A Mill Shift Testman	0	4
General Lab Testman	0	2
Lab Trainee	1	10
Lab Assistant	0	2
Lab Leadman	0	1
J. *Storeroom Department*		
Storeroom Clerk A	0	2
Storeroom Clerk C	0	1
Storeroom Clerk D	0	0
K. *Maintenance Department Employees*		
1st Maintenance Emp. Appren.	0	1
2nd Maintenance Emp. Appren.	0	9
3rd Maintenance Emp. Appren.	0	4
4th Maintenance Emp. Appren.	0	2
5th Maintenance Emp. Appren.	0	7
6th Maintenance Emp. Appren.	1	0
7th Maintenance Emp. Appren.	0	1
8th Maintenance Emp. Appren.	0	1
"C" Maintenance Employee	0	3
"B" Maintenance Employee	0	3
"A" Maintenance Employee	0	99
Leadman Maintenance Employee	0	7
L. *Miscellaneous*		
General Extra Board	2	62
Utility Extra Board	50	0
Truck Drivers	0	4

The "Extra Boards" of Item "L" above were introduced in the early 1950's for the purpose of maintaining a reservoir of employees who would be available to staff entry level jobs in the various lines of progression. The General Extra Board fed the "skilled" lines of progression and the Utility Extra Board fed the "unskilled" lines of progression. Both were manned by new employees and employees who had been laid off of other jobs and were waiting recall.

16. The 1968 labor contract made certain changes in the lines of progression. The chipper operator and crew lines of progression were merged on the basis of rates of pay into one line of progression, as were the chipper operator and line crew lines of progression and the brakeman and beaterman lines of progression. Separate departments were created out of old departments and the "dead end" job of janitor was eliminated. These changes in the lines of progression had the effect of eliminating, to some extent, their strictly segregated composition. However, it is to be noted that black employees were still "locked" in the lower paying job classifications. For example, the line of progression and the black-white racial composition of the reorganized wood yard department were as follows:

Wood Yard Department	*Negro*	*White*
Crane Operator (American)		
Crane Operator (large)	0	9
Long Log Operator	0	4
Log Stacker Operator	0	4
Small Equipment Operator	0	4
Bulldozer Operator	0	1
Oiler	0	4
Chip Unloader	1	3
Chipper Operator No. 2		
Chain Operator	0	4
Chipper Operator No. 1	4	0
Tractor Operator	5	0
Chip Bin Operator	4	0
Laborer	12	0

Thus, the blacks occupied the bottom twenty-five job positions within the wood yard department.

17. The General Extra Board and the Utility Extra Board were merged in 1968. Employees on the merged board still retain recall rights to jobs and lines of progression which they held prior to being reduced to the call board. The effect of this practice is that black employees are recalled to black jobs and white employees are recalled to white jobs.

18. Prior to 1958 no employment personnel tests were given to applicants at the Roanoke Rapids plant. In about 1956 the personnel manager was requested to design a personnel screening program for use in the selection of new employees to be hired for jobs created by the installation of a new paper machine. In this connection two "paper and pencil" tests — the Revised Beta Examination (Beta) and the Bennett Mechanical Comprehension Test — were selected. New employees hired for the General Extra Board and the Maintenance Department were required to score successfully on the Beta as well as have a high school education.

19. In an effort to validate the Beta, the examination was administered to a sample of employees who worked on the No. 3 paper machine, maintenance employees and possibly some employees in the pulp mill. The method that was followed is known by industrial psychologists as concurrent validation, that is, employees that were tested were then rated by their supervisors on the basis of performance on the job. As a result of this study, a cutoff score of 100 was established for the Beta. No blacks were known to be included in the validation sample.

20. Use of the Bennett Mechanical Test, which had previously been administered to job applicants, was discontinued in about 1963 and the company initiated the use of the Wonderlic, A and B series, along with the Beta test. Since that time the two pre-employment tests, the Beta and

the Wonderlic, series A and B, have been administered to applicants for Crane Operator (Wood Yard), Digester and C. E. Recovery (Pulp Mill), Paper Machine and Beater (A Paper Mill), Paper Machine and Stock Room (B Paper Mill), Power Plant Operator (Power Plant), Boiler Operator (Boiler Room), Mill and Laboratory (Technical Services) and Finishing and Shipping Crew (B Mill Product) lines of progression.

21. The Beta examination is a non-verbal test, developed during World War I to measure the intelligence of illiterate and non-English-speaking individuals.

22. The Wonderlic, series A and B, are short, verbal, widely-used intelligence tests. The explanation given for the use of these tests is that it was felt that it was essential for new employees to have certain verbal facilities because of the increasing technical nature of the mill operation. The cutoff score which was utilized for the Wonderlic, series A and B, is 18 on either test.

23. A high school education requirement was introduced in the early 1950's in response to a difficulty in finding qualified people for a modernized pulp mill. It was intended to assure a certain level of reading skill needed to comprehend the increasingly difficult material which accompanies technological innovations.

24. In December of 1964, Albemarle offered incumbent Negro employees who were then working in the Chipper, Service Crew, Payloader, Brokeman, First Fireman and Lead Loader lines of progression an opportunity to take the personnel tests in order to be considered for jobs in other lines of progression and waived its high school education requirement for incumbent black employees who could successfully pass these tests. This offer was made a second time on November 4, 1965, and some Negro employees took the test and were transferred. However, a majority of those who took the tests failed them.

25. Employees who do not have a high school education and who are in jobs in lines of progression are not required to successfully pass the test battery in order to be considered for future promotions in that line of progression. The policy applies to similarly situated white and black employees.

26. Albemarle has waived the necessity of successfully passing the test battery for a few of the black employees who do not have a high school education. Similarly, exceptions to this practice have been made for white employees.

27. Apart from the standardized lines of progression, Albemarle maintains a maintenance staff which services and repairs machinery throughout the mill. The maintenance staff is not served by the call boards. In 1959 the company with the agreement of the Union established a formalized training program for maintenance employees called the Maintenance Apprenticeship Program. A high school education and passing test scores are required for entrance into the program. Three employees selected by the Union and three members selected by the maintenance superintendent periodically review the performance of apprentices and recommend promotion or demotion within the program to the maintenance superintendent. The maintenance program is not divided into functional craft divisions. Thus, all employees in the program must qualify to acquire the skills of a machinist, welder, carpenter, electrician, painter, oiler, pipefitter, rigger, millwright and insulator during the apprenticeship program.

28. In 1964, prior to the effective date of the Civil Rights Act of 1964, the company began actively recruiting black applicants from the local high schools to apply for the Maintenance Apprenticeship Program. In addition, the company solicited applications from black employees working in other departments in the mill. The first black employee entered the program in 1964. There were five

blacks in the program by September of 1967 and as of 1970, ten blacks had entered the program. All had successfully met the high school and test qualifications for entrance.

29. After the Supreme Court decision in *Griggs* v. *Duke Power Company,* 401 U.S. 424 (1971), Albemarle again conducted validation studies of its testing and educational requirements. The company employed an expert in the field of industrial psychology and testing to conduct the studies. This expert utilized two manuals which outlined generally-accepted procedures for determining criterion-related validity: "Guidelines of Employee Selection, Procedures", Equal Employment Opportunity Commission, August 1, 1970, and "Standards for Educational and Psychological Tests and Manuals", published by the American Psychological Association.

30. In a study done on the testing requirements of Albemarle, the expert applied the "concurrent validation" technique to ten specific skill-related job groupings or lines of progression. An attempt was made to include in the sample all of the employees within the designated job groups. Two black employees refused to participate in the study, leaving only four blacks in the selected sample. Given this sample size, it was technically infeasible to validate the tests on a biracial basis.

31. Each employee in a job grouping was individually rated in comparison to every other individual employee in that grouping to obtain a ranking of job performance. The ratings took into consideration the elements of work behavior and job success. This rating method was performed twice by two different supervisors making independent evaluations. Neither of the raters had access to or knowledge of the sample employees' performance on the aptitude tests. The results of the dual ratings were then averaged to obtain the final job rating of the employees within each specific unit.

32. Each rated employee took, or had already taken, three tests—the Wonderlic Form A and Form B and the Beta Examination. The test scores were recorded for each individual. The tests were administered under controlled conditions by a trained personnel employee who had four years of experience in administering these particular tests.

33. The sample group rated and tested consisted only of present employees. The group tested was typical of employees in the skilled lines of progression. They were selected from the top and the middle of various lines. Professional studies have shown that when tests are validated in such a narrow range of competence, there is a greater chance that the test will validate even a broader range, that is, if job candidates as well as present employees are tested.

34. The data obtained from the ratings and the data obtained from the test scores were mailed to Purdue University where statistical correlation was performed. The expert correlated the job performance ratings and the test scores using the "Phi coefficient" formula to determine whether successful performance on the test was related to successful performance on the job.

35. The results of the validation study, presented both in statistical and graphical form, showed positive correlations of a statistically significant nature for nine of the ten specific job groupings. More particularly, the study revealed that eight of the ten units correlated positively on at least one of the tests in a manner which could have occurred only by chance only once in a hundred times. One unit correlated positively in a manner that could have occurred only once in twenty times.

36. The conclusion of the validation studies was that "inspection of the correlations and charts shown in this report shows quite conclusively that both the Beta and Wonderlic A tests can be reasonably used for both hiring

and promotion for most of the jobs in this mill. The charts indicate that a minimum score of 103 on the Beta for jobs in Recovery and Evaporation and a minimum score of 17 on the Wonderlic A for jobs in the other groups shown in the charts would not be at all out of line".

37. In addition to the validation studies that he performed on the aptitude tests, the defendants' expert undertook a specialized study to determine whether the company's high school requirement bore a significant relation to the jobs for which it was a prerequisite. Since the high school requirement was instituted in the hope of improving the reading levels of new employees, the expert designed a study to focus on this variable.

38. The EEOC Testing Guidelines provide that "appropriate validation strategies" may be substituted for a criterion-related validity study where the latter is not technically feasible. Under these circumstances, strategies to measure "content" relationships are permitted. In the case of the high school requirement, neither of the two principal criterion-related methodologies were feasible. A "concurrent validation" study was not feasible because present employees did not constitute a statistically fair sample of high school graduates and non-high school graduates. Similarly, a "predictive validation" study was not feasible because that method, by its nature, would require the indiscriminate hiring of high school and non-high school control groups, measuring their performance over an extended period of time, then correlating the data. The company's expert designed a strategy to measure the verbal skills and aptitude needed to comprehend reading material and other "content" which is integral to successful performance on jobs in the skilled lines of progression. For the first phase of this text a professionally-developed formula, the "Flesch Readability Index", was used to measure the reading difficulty of standard Operating Manuals used in the skilled lines of progression at the Roanoke Rapids

mill. These manuals contain information relating to the operation of sophisticated machinery. The sample manuals used in the study were chosen by normal "random selection" from a file containing all of the reading material used in the skilled lines. The second phase of the technique employed merely required the expression of the "Flesch Count" in terms of the relevant criterion to be validated—in this case grades of education.

39. The "Flesch Index", which measures the difficulty of "content" based on syllable/word and word/sentence ratios, revealed that the reading difficulty of the Operating Manuals was such as to require the reading level of a high school graduate with perhaps some college. The expert concluded from his study that an individual must read at least at the level of a normal high school graduate to read the manuals.

40. The Operating Manuals contain information, the knowledge of which is required for the safe and efficient use of the machines and chemicals in the plant.

41. Some industrial psychologists believe that the average scores obtained by blacks as a group on written tests are lower than the average scores obtained by whites as a group. Although the reasons for this are not entirely clear, it is explained in part by the fact that blacks in many parts of the country obtain inferior schooling as compared to whites, and in part by the fact that in some cultural backgrounds where blacks are not accustomed to close working relationships with whites, test scores of blacks are affected by having the test administered by white examiners. This is true not only for blacks but also for Mexicans, Puerto Ricans and whites of a lower income group. Although psychologists have made and are making an effort to construct cultural-free tests, these efforts, in the opinion of some psychologists, have not been successful so far.

42. A personal tour of the defendants' plant in company with counsel for plaintiffs and defendants served to convince the court that much of the machinery now in use is of a highly sophisticated and technically complex nature. Computers are used extensively throughout the production process as well as in the record-keeping, billing, shipping, purchasing and accounting operations. The efficient maintenance and operation of this machinery and electronic equipment obviously requires employees with a high level of native intelligence, prolonged training and experience.

CONCLUSIONS OF LAW

1. This court has jurisdiction of this action under the provisions of Section 706(f) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f).

2. The corporate defendants are employers in an industry affecting interstate commerce within the meaning of section 701(b) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(b).

3. The defendant Local 425 is an organization engaged in an industry affecting commerce within the meaning of Section 701(d), (e) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (d), (e).

4. Pla...tiffs have complied with the procedural requirements of Sections 706(a), (d) and (e) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(a), (d) and (e).

5. Section 703(a) of Title 7, 42 U.S.C. § 2000e-2(a), prohibits an employer from discriminating against an employee "with respect to his compensation, terms, condition, or privileges of employment, because of such individual's race . . .", or from limiting, segregating or classifying an employee "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, be-

cause of such individual's race". Subsection (c) of the same section defines as unlawful employment practices similar acts when done by a labor union. Subsection (h) provides that

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment *pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race . . .* nor shall it be an unlawful employment practice for an employer to give and to act upon the results of *any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race . . .*" (Emphasis added.)

6. The Act does not provide redress for discriminatory employment practices occurring prior to July 2, 1965, the effective date of the Act. However, employment practices which tend to perpetuate past discriminations are unlawful, unless there is an overriding legitimate, non-racial business necessity. *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971); *Robinson* v. *Lorillard*, 444 F.2d 791 (4th Cir. 1971). And Section 706(g) of the Act, 42 U.S.C. § 2000e-5(g), provides for equitable relief only if the court finds that a defendant "has intentionally engaged in or is intentionally engaging in an unlawful employment practice". This provision has been interpreted to require only that the defendant "meant to do what he did, that is, his employment practice was not accidental". See *Robinson, supra*, at 796 (quoting from *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F.2d at 966). Viewed in this light, it is clear that Albemarle practiced racially discriminatory employment practices prior to July 2, 1965; that the effects of this discrimination has been perpetuated; and that such employment practices are unlawful under Title VII of the Civil Rights Act of 1964.

7. It is undisputed that prior to January 1, 1964, Albemarle's lines of progression were strictly segregated on the basis of race. Negro employees were traditionally assigned to the lower paying lines of progression. Although overt racial discrimination ceased subsequent to the effective date of Title VII, the effects of this racial discrimination have not been eradicated. The job seniority system has resulted in blacks occupying the lower paying positions within an integrated line of progression. Other lines of progression remain essentially segregated because of the inability of black employees to meet the educational and testing requirements to transfer into other, higher-paying lines of progression. It follows that these practices must be enjoined in toto unless they have been shown to be "necessary to the safe and efficient operation of the business". *Jones* v. *Lee Way Motor Freight*, 431 F.2d 245, 249 (10th Cir. 1970), cited with approval in *Robinson, supra.*

8. This court has found as a fact that the efficient maintenance and operation of Albemarle's machinery requires a certain degree of training and experience. However, a system of promotion and demotion based upon *job seniority*, unrelated to the minimum tenure required to gain the necessary proficiency in that job classification, is arbitrary and, when viewed in the context of past discriminatory practices, constitutes an unlawful employment practice. A system of promotion and demotion based on *plant* seniority would accomplish the purpose of awarding faithful employees, and a job residency requirement, based upon the minimum tenure required to gain the skill and proficiency of a given job classification, would insure the safe and efficient operation of the plant and the promotion of black employees relatively unhindered by past overt acts of employer discrimination. See *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F.2d 980 (5th Cir. 1969); *Long* v. *Georgia Kraft Company*, 2 F.E.P. Cases 658 (N.D.Ga. 1970).

9. This court has also found as a fact that a certain level of native intelligence is required for the safe and efficient operation of Albemarle's often complicated and sophisticated machinery. The personnel tests administered at the plant have undergone validation studies and have been proven to be job related. The defendants have carried the burden of proof in proving that these tests are "necessary for the safe and efficient operation of the business" and are, therefore, permitted by the Act. However, the high school education requirement used in conjunction with the testing requirements is unlawful in that the personnel tests alone are adequate to measure the mental ability and reading skills required for job classifications.

10. In addition to injunctive relief, the plaintiffs seek an award of the amount of pay which would have accrued to them had there been no unlawful practices. 42 U.S.C. § 706(g) provides that the court "*may* . . . order such affirmative relief as *may* be appropriate, including reinstatement or hiring of employees, *with or without back pay*". The statute thus speaks clearly in terms of the discretionary power of the court. See *Local 186, International Pulp, Sulphite and Paper Mill Workers* v. *Minnesota Mining and Manufacturing Company*, 304 F.Supp. 1284 (N.D.Ind. 1969). *Robinson*, supra, can be read to hold that back pay is a compensation for a tangible economic loss and that the plaintiff class is *entitled* to that compensation. However, the Fourth Circuit was there concerned with the defendant's contention that it was an abuse of discretion *to award* back pay. It did not address itself to the clear statutory language of Section 706(g).

In the instant case there was no evidence of bad faith non-compliance with the Act. It appears that the company as early as 1964 began active recruitment of blacks for its Maintenance Apprenticeship Program. Certain lines of progression were merged on its own initiative, and as judicial decisions expanded the then existing interpreta-

tions of the Act, the defendants took steps to correct the abuses without delay. And perhaps unlike the tobacco industry involved in *Robinson*, supra, the paper industry is justified in requiring that its employees possess a certain degree of training and experience. Furthermore, there is evidence to support a finding that Albemarle has consistenty paid higher wages at all levels of employment than thoes paid by other industries in the area—doubtless a reflection of the sophistication of the industry.

In addition, an award of back pay is equitable remedy. *Robinson*, 444 F.2d at 802, supra. The plaintiff's claim for back pay was filed nearly five years after the institution of this action. It was not prayed for in the pleadings. Although neither party can be charged with deliberate dilatory tactics in bringing this cause to trial, it is apparent that the defendants would be substantially prejudiced by the granting of such affirmative relief. The defendants might have chosen to exercise unusual zeal in having this court determine their rights at an earlier date had they known that back pay would be at issue. See *Rental Development Corporation of America* v. *Lavery*, 304 F.2d 839, 842 (9th Cir. 1962), cited with approval in *Robinson*, supra.

On the basis of the foregoing Findings of Fact and Conclusions of Law it is now

ORDERED, ADJUDGED AND DECREED

I. Albermarle Paper Company (Delaware) and Halifax Local 425, United Papermakers and Paperworkers, AFL-CIO, their officers, agents, employees and servants and all persons in active concert or patricipation with them, are hereby permanently enjoined and restrained from discriminating against the Negro employees of the defendant Albemarle Paper Company (Delaware) at its paper mill in Roanoke Rapids, North Carolina, in violation of Title VII of the Civil Rights Act of 1964.

A. In particular, the defendants are ordered to abolish the existing seniority system based substantially on job seniority and to refrain from negotiating or implementing any other seniority system designed to discriminate or having the effect of discriminating against Negroe employees, insofar as such systems may apply to permanent job assisgnments, and permanent promotions and layoffs of employees in the affected class, in competition with other employees at the Roanoke Rapids paper mill of Albemarle Paper Company (Delaware).

B. In place of the seniority system so abolished, the defendants are ordered to implement and permanently continue a system of plant seniority with respect to permanent job assignments and permanent promotions and layoffs of employees in the affected class, so that in making permanent promotions or demotions within a line of progression, or in making permanent transfers, promotions or demotions to or from a line of progression, when employees of the affected class are competing with employees not of the affected class, and the qualifications of the competitors are relatively equal, plant seniority rather than job seniority shall govern. Albemarle Paper Company (Delaware) shall not discriminate on the basis of race in making any temporary assignments, promotions, layoffs or demotions at its Roanoke Rapids plant.

C. Plant or mill seniority shall be determined as length of continuous service from most recent date of permanent employment.

D. Qualifications as used immediately above and elsewhere in this decree shall be deemed to refer to (1) ability and fitness, (2) knowledge and training, and (3) experience and skill developed during an employee's tenure at the mill. Where a member of the affected class with higher plant seniority competes for a job with a non-member having lower plant seniority, the latter shall not be deemed more qualified for promotion simply because of ability,

fitness, knowledge, training, experience or skill which are the product of his longer tenure in job slots immediately below the vacancy, subject, however, to the use of reasonable residency requirements in job slots within lines of progression as set forth in Appendix A to this decree. The residency requirements of Appendix A are subject to amendment if the parties, within thirty days, submit additional evidence or stipulations bearing on the minimum on-the-job training requirements for safety and proficiency in a given job classification.

E. In making permanent promotions within a line of progression, or in making permanent transfers, promotions or demotions to or from a line of progression, the lowest paying job in each line of progression shall be the proper job for beginning in the line, and proper progression shall be the proper job for beginning in the line, and proper progression shall be to the job next higher than that currently held by the employee.

F. Normal seniority provisions, without the modifications of this decree, shall prevail in making permanent promotions or demotions:

1. When employees not of the affected class compete with each other, such as when no employees in the job classification from which the promotion or demotion is to be made are of the affected class, or when there are two or more employees not of the affected class who have longer company service than an affected class employee in the job classification from which the promotion or demotion is to be made;

2. When employees of the affected class compete with each other, such as when all employees in the job classification from which the promotion or demotion is to be made are of the affected class, or when there are two or more employees of the affected class who have longer company service than an employee who is not of the affected class

in the job classification from which the promotion or demotion is to be made.

G. Employees who are transferred from one line of progression to another shall carry their seniority and wage rate as provided in Section 10.2.2 and 10.2.3 of the current Labor Agreement, except that in no event shall the rate retention right or "Red Circle" rate exceed $3.36 per hour (straight time). The "Red Circle" protection provided in this paragraph shall apply to only one transfer made pursuant to this decree.

H. Defendants are directed to amend the seniority provisions of Section 10 of the Labor Agreement to provide for the posting of all permanent vacancies to entry level jobs in the various lines of progression as contained in Appendix A. Such posting shall be for three (3) calendar days on the clock house bulletin board.

I. The defendants are permanently enjoined and restrained from requiring a high school education as a prerequisite for employment, promotion or transfer.

II. The defendants are directed to amend the Labor Agreement to include provisions for assignments from the Call Board incorporating the following terms:

A. Immediately after a determination has been made of available job assignments, and prior to any assignments being made, employees meeting the shift who have recall rights to any job listed must indicate to the clock room attendant whether or not they wish to exercise such recall rights.

B. Thereafter the senior qualified employee meeting the shift in terms of plant or mill seniority will be given the choice of all the then available jobs. Succeeding offers will be made to those meeting the shift in order of their decreasing mill seniority.

C. Requests coming in after posting of the lists and the start of assignments shall be immediately made available to those meeting the shift who have not already received assignments.

III. The request for abolition of or changes in testing procedures is denied for the reasons set forth in the Findings of Fact and Conclusions of Law.

IV. The request for an award of back pay is denied for the reasons set forth in the Findings of Fact and Conclusions of Law.

V. Counsel for the parties are directed to confer among themselves in an effort to reach an agreement on reasonable attorneys' fees for plaintiffs' counsel and the apportionment thereof among the defendants. They shall report to the court within thirty days of the entry of this decree whether they have been able to reach an agreement, and if not the court will then determine the amount of fees and their apportionment.

IT IS SO ORDERED.

This 9th day of November, 1971.

/s/ F. T. DUPREE, JR.
F. T. Dupree, Jr.
United States District Judge

[APPENDIX A]

Method for Calculating Residency Requirements

When calculating time spent on a particular job for purposes of determining when the residency requirement has been satisfied, the following will be counted toward satisfaction of the residency requirement of a particular job classification:

1. Time worked while permanently assigned to the job in question.

2. Time worked while permanently assigned to a job below the job in question but assigned on a temporary basis to the job in question, provided such temporary time on the job equals or exceeds 48 hours in any calendar month, in which case all such temporary time in that month will be counted. In the event that temporary time on a particular job does not amount to 48 hours in one calendar month, all such temporary time in that month will be counted toward satisfying the residency requirement of the job to which the employee is then permanently assigned.

Time worked on either a permanent or temporary basis as defined above shall satisfy residency requirements as follows:

1. 172 hours actually worked shall satisfy one month of residency.

2. 40 hours actually worked shall satisfy one week of residency.

APPENDIX A

Residency Requirements

Wood Yard Department

Crane Operator (American)	
Crane Operator (Large)	11 months
Long Log Operator	9 months
Log Stacker Operator	8 months
Small Equipment Operator	8 months
Bulldozer Operator	6 months
Oiler	6 months
Chip Unloader	3 months
Chipper Operator No. 2	3 months
Chain Operator	3 months
Chipper Operator No. 1	3 months
Tractor Operator	3 months
Chip Bin Operator	3 months
Laborer	1 month

Pulp Mill Department

Digester Operator (Cooker)	
Stock Room Operator	12 months
Stock Room First Helper	12 months
Stock Room Second Helper	6 months
C. E. Recovery Operator	
1st Helper No. 6	15 months
Evaporator Operator (when used)	12 months
1st Helper No. 5	12 months
2nd Helper	9 months
Utility Helper	4 months
Caustic Operator	
Lime Kiln Operator	12 months
By Products Operator	
Leadloader—Blower	9 months
Loader	6 months

Power Plant

Power Plant Operator	
1st Helper	18 months
2nd Helper	12 months

B Mill Shipping

Scale Clerk	
Lift Truck Operator	12 months
Utility Man	9 months
Laborer	3 months

Boiler Room Department

Boiler Operator	
Bark Burner Operator	10 months
1st Fireman	9 months
2nd Fireman	6 months
Laborer	3 months

B Paper Mill Department
Paper Machine Progression

Machine Tender	
Back Tender	36 months
3rd Hand	24 months
4th Hand	12 months
5th Hand	4 months
6th Hand	2 months
7th Hand	1 month

Stock Room Progression

Stock Room Operator	
Stock Room 1st Helper	12 months
Stock Room 2nd Helper	6 months

Technical Services
Mill Progression

B Mill Shift Testman	
Additive Man	15 months

Laboratory

General Lab Testman	
General Lab Assistant	15 months
Sampleman	6 months
Trainee	3 months

Service Department

Payloader	
Dempster-Dumpster Operator	10 months
Winch Truck Operator	9 months
Truck Operator	9 months
Winch Truck Operator Helper	3 months
Laborer	1 month

Store Room Department

Storeroom Clerk A	
Storeroom Clerk B	6 months
Storeroom Clerk C	6 months
Storeroom Clerk D	6 months

A Paper Mill Department
Paper Machine

Machine Tender No. 1	
Machine Tender No. 2	30 months
Back Tender No. 1	26 months
Back Tender No. 2	26 months
Third Hand No. 1	24 months
Third Hand No. 2	24 months
Fourth Hand No. 1	12 months

Fourth Hand No. 2	12 months
Front Plugger No. 1	4 months
Back Plugger No. 1	4 months
Back Plugger No. 2	3 months

A Paper Mill Department
Beater Room

Beaterman	
1st Helper	12 months
Brokeman	6 months

Shipping Room Department A Mill

Lead Loader	
Lift Truck Operator	12 months
Lead Tier and Wrapper	6 months
Wrapper Loader, Laborer	3 months

Filed Feb. 20, 1973

APPENDIX C

Judgment

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-1267

JOSEPH P. MOODY, THEODORE DANIELS, HENRY HILL and ARTHUR MITCHELL, *Appellants*,

v.

ALBEMARLE PAPER COMPANY, a Virginia Corporation; UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, and HALIFAX LOCAL NO. 425, UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO,

and

ALBEMARLE PAPER COMPANY, a Delaware Corporation, HOERNER WALDORF CORPORATION, a Delaware Corporation, FIRST ALPACO CORPORATION, and ETHYL CORPORATION, a Virginia Corporation, *Appellees*.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Amicus Curiae*.

Appeal from the United States District Court for the Eastern District of North Carolina.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of North Carolina, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed.

/s/ WILLIAM K. SLATE, II
Clerk

APPENDIX D

Filed Sepptember 13, 1974

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-1267

JOSEPH P. MOODY, THEODORE DANIELS, HENRY HILL, and ARTHUR MITCHELL, *Appellants,*

v.

ALBEMARLE PAPER COMPANY, a Virginia Corporation; UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, and HALIFAX LOCAL No. 425, United Papermakers and Paperworkers, AFL-CIO,

and

ALBEMARLE PAPER COMPANY, a Delaware Corporation, HOERNER WALDORF CORPORATION, a Delaware Corporation, FIRST ALPACO CORPORATION, and ETHYL CORPORATION, a Virginia Corporation, *Appellees.*

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh.

Upon motions of the appellees, by their counsel and for cause shown,

IT IS ORDERED that the judgment in lieu of the mandate be, and the same is hereby, recalled; that the Clerk of the United States District Court for the Eastern District of North Carolina, at Raleigh, is directed to return to the Clerk of this Court the certified copy of the judgment issued in lieu of the mandate; and that the mandate be stayed for a period not to exceed thirty (30) days, pend-

ing application of the appellees in the Supreme Court of the United States for a writ of certiorari to this Court.

For the Court—by direction.

WILLIAM K. SLATE, II
Clerk

(Seal) MC

A True Copy, Teste:
William K. Slate, II, Clerk

By VIRGINIA LIPFORD
Deputy Clerk

APPENDIX E

Filed June 22, 1974

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-1267

JOSEPH P. MOODY, THEODORE DANIELS, HENRY HILL, and ARTHUR MITCHELL, *Appellants,*

v.

ALBEMARLE PAPER COMPANY, a Virginia Corporation; UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, and HALIFAX LOCAL No. 425, United Papermakers and Paperworkers, AFL-CIO,

and

ALBEMARLE PAPER COMPANY, a Delaware Corporation, HOERNER WALDORF CORPORATION, a Delaware Corporation, FIRST ALPACO CORPORATION, and ETHYL CORPORATION, a Virginia Corporation, *Appellees.*

Order

It appearing from the decision of the Supreme Court in Moody v. Albemarle Paper Co., — U.S. —, 42 L.W. 3689

(June 17, 1974) (per curiam), that the order heretofore entered on June 25, 1973, setting this case for rehearing in banc, was improvidently entered, in that only active circuit judges were entitled to vote in the poll on the suggestion for rehearing in banc and a majority of the active circuit judges voted against rehearing in banc;

Accordingly, it is ORDERED that said order of June 25, 1973 be, and it is hereby, rescinded, and the petitions for rehearing and rehearing in banc be, and they are hereby, denied.

CLEMENT L. HAYNSWORTH, JR.
Chief Judge

A True Copy, Teste:
William K. Slate, II, Clerk

By FAYE CHLORIE
Deputy Clerk

APPENDIX F

DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

SEC. 703. (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of

such individual's race, color, religion, sex, or national origin.

* * * * * * * * * *

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

* * * * * * * * * *

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin * * *

* * * * * * * * * *

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SEC. 705. (a) There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party, who shall be appointed by the President by and with the advice and consent of the Senate. * * *

* * * * * * * * * *

PREVENTION OF UNLAWFUL EMPLOYMENT PRACTICES

SEC. 706. (a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this title has occurred (and such charge sets forth the facts upon which it is based) that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization (hereinafter referred to as the "respondent") with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such endeavors may be made public by the Commission without the written consent of the parties, or used as evidence in a subsequent proceeding. * * *

* * * * * * * * * *

(e) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) (except that in either case such period may be extended to not more than

sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this title, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

(f) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title.

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice).

• • • • • • • • • • •

(k) In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

• • • • • • • • • • •

SEC. 716. (a) This title shall become effective one year after the date of its enactment.

• • • • • • • • • • •

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-1267

JOSEPH P. MOODY, THEODORE DANIELS, HENRY HILL, AND ARTHUR MITCHELL, *Appellants,*

v.

ALBEMARLE PAPER COMPANY, a Virginia corporation; UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, AND HALIFAX LOCAL No. 425, UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO,

and

ALBEMARLE PAPER COMPANY, a Delaware corporation, HOERNER WALDORF CORPORATION, a Delaware corporation, FIRST ALPACO CORPORATION, and ETHYL CORPORATION, a Virginia corporation, *Appellees.*

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Amicus Curiae.*

No. 73-1479

BAXTER K. WILLIAMS, ALBEMARLE EMPLOYMENT COORDINATING COMMUNITY DEVELOPMENT ASSOCIATION, an unincorporated association, and the North Carolina Teachers Association, a corporation, *Appellees,*

v.

THE ALBEMARLE CITY BOARD OF EDUCATION, a public body corporate, Appellant.

Certificate

The Judges of the United States Court of Appeals for the Fourth Circuit, pursuant to the provisions of 28

U.S.C. § 1254(3), respectfully certify the following question to The Supreme Court of the United States:

Under 28 U.S.C. § 46 and Rule 35 of the Federal Rules of Appellate Procedure, may a senior circuit judge, a member of the initial hearing panel, vote in the determination of the question of whether or not the case should be reheard *en banc*?

The question is of determinative importance in each of the cases.

In *Moody*, two senior circuit judges were members of the original hearing panel and participated in the decision. Upon a suggestion of a rehearing *en banc*, each voted for it. Though a majority of the judges in regular active service did not vote for an *en banc* rehearing, the votes of the two senior circuit judges were counted providing a majority of the counted votes in favor of rehearing *en banc*. On that basis, a rehearing was ordered and held, the two senior judges participating in the hearing as provided in 28 U.S.C. § 46. If the *en banc* court reaches the merits, the tentative vote is that it will modify the panel decision wiht respect to an award of back pay.

In *Williams*, one senior circuit judge was a member of the initial hearing panel. Upon a suggestion of a rehearing *en banc*, he is opposed. A majority of the judges in regular active service is in favor of an *en banc* rehearing, but if the vote of the senior circuit judge is counted, the suggestion will fail by an equal division of the judges. No formal order has been entered on the petition for rehearing with a suggestion for rehearing *en banc*, because the question of the right of the senior circuit judge to vote arose. The panel has reversed an award of damages by the district court, but if the voting on the petition for rehearing is an accurate prediction, the *en banc* court, if it reaches the merits of the appeal,

probably would affirm the district court by an equally divided court.

In the Court of Appeals for the Fourth Circuit, the custom has been to count the votes of senior circuit judges who were members of the initial hearing panel when the court was polled on the question of *en banc* rehearing. This was thought reasonable since the voting senior circuit judge would be a member of the *en banc* court if rehearing were granted. In earlier cases, however, the vote of the senior circuit judge or judges was not crucial. The fact that it is crucial in these two cases occasioned a close examination of the statute and the rule, and a look at *Zahn* v. *International Paper Co.*, 2 Cir., 469 F.2d 1033, 1040-32, and *Allen* v. *Johnson*, 5 Cir., 391 F.2d 527, 532.

Were the answer to the question in each case of importance to the litigants only, the Judges of the Court of Appeals for the Fourth Circuit, sitting *en banc*, could decide it, though in *Williams* v. *Albemarle City Board of Education*, there is a possibility of an equal division of the court. The question, however, involves more than the rights of the litigants, for the duties and responsibilities of some of the judges of the court are in issue and relative powers of participation are at stake.

The execution of this Certificate has been authorized by the two senior circuit judges and by all of the judges in regular active service.

/s/ CLEMENT F. HAYNESWORTH, JR.
Clement F. Haynesworth, Jr.
Chief Judge,
Fourth Circuit

SUPREME COURT U. S.
NOV 20 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-389

ALBEMARLE PAPER COMPANY, *et al.*,

Petitioners,

v.

JOSEPH P. MOODY, *et al.*,

Respondents.

No. 74-428

HALIFAX LOCAL NO. 25, UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO,

Petitioner,

v.

JOSEPH P. MOODY, *et al.*,

Respondents.

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-389

ALBEMARLE PAPER COMPANY, *et al.*,

Petitioners,

v.

JOSEPH P. MOODY, *et al.*,

Respondents.

No. 74-428

HALIFAX LOCAL NO. 25, UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO,

Petitioner,

v.

JOSEPH P. MOODY, *et al.*,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION

Respondents Joseph P. Moody, et al., file this single brief in opposition to the Petitions for a Writ of Certiorari filed by Albemarle Paper Company, et al., in No. 74-389 and by Halifax Local No. 25, United Papermakers and Paperworkers, AFL-CIO in No. 74-428.

Questions Presented

The issues in Nos. 74-389 and 74-428 arising from the grant of class-wide back pay are:

1. Whether, in determining whether to award compensatory back pay, a private employer's voluntary practices of racial discrimination should be treated like those mandated by state "protective" statutes which some courts have decided justify withholding back pay in sex discrimination cases? (Nos. 74-389 and 74-428)

2. Whether the district courts, in the exercise of their discretion to award back pay, should be free of appellate guidelines effectuating the statutory purpose of according full relief to victims of employment discrimination? (Nos. 74-389 and 74-428)

3. Whether the Court of Appeals erroneously decided that no "special circumstances" justify denial of back pay in this case? (No. 74-389)

4. Whether a class back pay award is incompatible with Rule 23, Federal Rules of Civil Procedure, or the Congressional purpose of Title VII? (Nos. 74-389 and 74-428)

The issues in No. 74-389 arising from the injunction against the testing program are:

5. Whether the EEOC Guidelines embody standards which may be considered in evaluating an employer's attempt to validate its discriminatory employment aptitude tests?

6. Whether an employer may continue to utilize unlawful employment aptitude tests while making further attempts to justify the tests?

Statement of the Case

Petitioner Albemarle's statement of the proceedings below (Co. Pet. 3-4, 6-7)[1] is generally accurate. In stating the facts, however, both Petitioners neglect to mention that Respondents and their class of black employees suffered severe loss of income as a result of Petitioners' continuing practices of systemic employment discrimination. The Petitions raise issues related to two distinct aspects of those discriminatory policies: seniority and promotional practices, and written aptitude testing.

1. Seniority and Promotional Practices.

Petitioners kept all jobs and departments strictly segregated until 1964 under an express policy of discrimination (Co. Pet. App. 7-12). Segregated "extra boards" assured that the racial staffing of lines of progression would be breached neither by regular promotions nor by employee recalls (Co. Pet. App. 12-13). The district court found that Petitioners had "intentionally" perpetuated this overtly discriminatory system after 1965, by means of an unlawful job seniority system (Co. Pet. App. 22-24). Neither Petitioner took an appeal from this obviously correct finding although Albemarle's Petition now implies (the record notwithstanding) that judicial intervention was only the handmaiden to a benevolent employer's voluntary reform (Co. Pet. 5).[2]

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[1] Citations in the form of "Co. Pet." are to the Petition filed by Albemarle Paper Company in No. 74-389. Citations to "U. Pet." are to the Petition of Halifax Local No. 25, the Union, in No. 74-428. The respective Petitioners are sometimes referred to as "Albemarle" or the "Company" and the "Union" hereinafter.

[2] Albemarle's assertion that the 1968 contract adopted "plant seniority" is erroneous. In fact that contract only allowed carryover of job seniority into the lowest job of the transferee's new

The district court found that this unlawful seniority system limited black workers to the lower-paying departments and, within "integrated" departments, to the lower-paying jobs (Co. Pet. App. 7-13). As of June 30, 1967 there was an average pay differential between white and black workers of approximately $0.55 per hour or $1,144.00 per average work year; in excess of 200 white workers earned a wage a quarter per hour or more above the highest black wage at the mill.

2. Testing and the Validation Study.

At all times since 1963, Albemarle has required satisfactory scores on two "paper and pencil" tests as a prerequisite to hiring or transfer into most of the more desirable and lucrative, *i.e.* all-white, jobs (Co. Pet. App. 13-14). These tests, which included the Wonderlic (declared unlawful in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971)), disproportionately screened out black employees (Co. Pet. App. 38). Albemarle used its tests in precisely the same manner condemned by *Griggs*.[3] This case differs from *Griggs* only in that here the Company made a belated effort to justify its testing under the *Griggs* rule.

Albemarle made no effort to study whether its test usage (begun in 1963) was job-related, until several months before trial (Co. Pet. 5). Then it hired an expert who per-

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line of progression; it did *not* allow for subsequent use of plant seniority in competing for promotions up the line (Co. Pet. App. 6). Moreover, the contract gave no one a right to transfer, but rather left transfer requests within the Company's sole discretion (*id.*). Petitioners did not completely eliminate the unlawful features of their contract until over six years after Title VII became effective, when they were enjoined to do so by the district court.

[3] That is, blacks were required to pass the tests to gain access to white jobs after 1965, even though many white incumbents had not had to take or pass the tests in order to get or keep the same jobs (Co. Pet. App. 15).

formed a hurried validation study riddled with manifest deficiencies which violated EEOC Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607.1 *et seq.* (see Co. Pet. App. 36-43). Based on this study, the expert recommended that the tests were valid for *some* jobs for which Albemarle had required them (Co. Pet. App. 38). Albemarle, however, continued to require tests in *all* instances, using them and relying on them for its legal defense, to screen applicants for many jobs for which there was *no* evidence of job-relatedness because no study had been performed, or for which the study demonstrated no significant degree of job-relatedness (*id.*).[4]

ARGUMENT

I.

This Court Should Not Review the Back Pay Award.

A. *There Is No Significant Conflict Among the Circuits as to the Propriety of Class Back Pay in Title VII Cases.*

Petitioners' arguments about a conflict of Circuits on class back pay awards in Title VII cases overlooks the fact that the Courts of Appeals have developed two well-established, consistent lines of cases.

The first line arises from cases in which a private employer and/or union voluntarily commit unlawful employment discrimination *not* required by any state law. Such cases typically involve racially restrictive seniority, promotion, or transfer systems, non-job-related testing practices, or unjustifiable educational requirements, which

[4] The same expert also studied the job-relatedness of Albemarle's high school education requirement and concluded that it was valid (Co. Pet. App. 19-20). The district court rejected his conclusion and held the requirement unlawful (*id.* 24); Albemarle did not appeal this finding.

inflict economic injury on members of the class. See, *e.g.*, *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971), *cert. dismissed* 404 U.S. 1006 (1972); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); *Franks* v. *Bowman Transportation Co.*, 495 F.2d 398 (5th Cir. 1974), *cert. filed* October 15, 1974, No. 74-424; *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 437 (5th Cir. 1974), *cert. filed* September 28, 1974, No. 74-351; *Head* v. *Timken Roller Bearing Co.*, 486 F.2d 870 (6th Cir. 1973); *Bowe* v. *Colgate-Palmolive Co.*, 489 F.2d 496 (7th Cir. 1973), following 416 F.2d 711 (7th Cir. 1969). The case at bar closely resembles these cases on its facts and in the decision of the Court of Appeals.[5]

The cases that Petitioners rely on, denying back pay—*Kober* v. *Westinghouse Electric Corp.*, 480 F.2d 240 (3rd Cir. 1973); *Manning* v. *International Union*, 466 F.2d 812 (6th Cir. 1972), *cert. denied* 410 U.S. 946 (1973); and *Schaeffer* v. *Yellow Cabs, Inc.*, 462 F.2d 1002 (9th Cir. 1972)—are from a second, easily distinguishable mold. Each involved an employer practice limiting women's employment opportunities in obedience to mandatory state female protective statutes. In each,[6] the employer faced a dilemma created by conflicting state and federal regulatory statutes. In this line, the Courts of Appeals hold that back pay should not be awarded where the employer's practice was required by state legislation presumptively valid until declared illegal under Title VII.

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[5] Indeed, the Fifth Circuit in *Johnson* and *Pettway* and the Sixth Circuit in *Head* approve and adopt the decision of the Fourth Circuit in this case. That decision, in turn, approves and relies on *Robinson* and *Bowe*.

[6] See also, *LeBlanc* v. *Southern Tel. & Tel. Co.*, 333 F. Supp. 602 (E.D. La. 1971), *aff'd per curiam* 460 F.2d 1228 (5th Cir. 1972), *cert. denied* 409 U.S. 990 (1972); *Rosenfeld* v. *Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971).

Kober v. *Westinghouse Electric Corp., supra,* follows the same reasoning. There the Third Circuit rests its opinion squarely on the logic of *Manning, Schaeffer,* and *LeBlanc,* see 480 F.2d at 247-248.[7]

Here, Petitioners' discrimination was not required by law but, on the contrary, violated all applicable statutes.[8] There is no conflict among the Circuits on back pay on the facts of this case.

B. *The Court of Appeals Opinion States an Appropriate Standard for the Exercise of Discretion to Award Back Pay.*

Both Petitioners direct their attack more to the standard announced by the Court of Appeals—

> a plaintiff or a complainig class who is successful in obtaining an injunction under Title VII of the Act should ordinarily be awarded back pay unless special circumstances would render such an award unjust [Co. Pet. App. 46-47]

—than to the result in this case. But the Union Petitioner's Statement (and its statement of the Question Presented)

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[7] *Kober,* notwithstanding its reference to Judge Boreman's dissent as noted by Petitioners, 480 F.2d at 247, in no way conflicts with the holding in this case. The *Kober* holding can be read at most to require that a district judge not be deprived of discretion to deny back pay in the circumstances of the state protective law cases. The Fourth Circuit's opinion in this action allows for and contemplates the *Kober* result, see Co. Pet. App. 47 n.5.

[8] Faced with the same argument made by Petitioners here, the Fifth Circuit wrote in *Johnson* v. *Goodyear Tire & Rubber Co., supra,* 491 F.2d at 1377,

> "Goodyear has failed to disclose to us any Texas laws which required the invidious employment discrimination revealed here. The reason for this efficacious omission is manifest; no similar "protective" legislation based on racial grounds has ever been enacted in Texas. Such an argument falls of its own weight."

seriously mischaracterizes the holding below. Contrary to the Union's assertions, the opinion does not "preclude the trial court, in this and future cases, from exercising *any* degree of discretion" in back pay cases (U. Pet. 8, emphasis added); it does not "predetermine all present and potential suits . . . within the aegis of the Fourth Circuit" (*id.* 9); nor does it state an "inflexible position" (*id.* 9) or a "hard and fast rule" of "mandatory back pay" (*id.* 10). Rather, the Fourth Circuit has done no more or less than decide a case and state its rationale, which will have appropriate precedential effect.

One of the most important functions of an appellate court is to maintain consistency of decisions within its Circuit, *cf. Moody* v. *Albemarle Paper Co.*, 41 L.Ed.2d 358, 362 (1974). The Fourth Circuit's articulation of a standard for district courts' exercise of discretion for awarding back pay, an issue frequently litigated in the Circuit, promotes and is essential to consistency.[9]

A standard ensuring the exercise of discretion in conformity with statutory purposes is proper and necessary to assure that discretionary powers are correctly utilized. As this Court has held,

> When [discretion is] invoked as a guide to judicial action, it means a sound discretion, that is to say, a discretion exercised not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law.

Langnes v. *Green*, 282 U.S. 531, 541 (1931). See also, *Hecht Co.* v. *Bowles*, 321 U.S. 321, 331 (1944) (exercise of dis-

[9] This standard is not an "advisory opinion" (*cf.* U. Pet. 11), since it was reached and applied in hotly contested litigation of immediate importance to the parties; rather it states a rationale for the court's holding in the case.

cretion must further legislative objectives)[10]; *United States* v. *Georgia Power Co.*, 474 F.2d 906, 921 (5th Cir. 1974); *Franks* v. *Bowman Transportation Co., supra*, 495 F.2d at 421.

In order to effectuate the statutory purposes of Title VII, the Fourth Circuit's standard carefully delineates limitations on a district court's discretion based on the "special circumstances" test (Co. Pet. App. 45-47). In some "special circumstances" a denial of back pay will be appropriate. Footnote 5 of the opinion (Co. Pet. App. 47) indicates at least one such circumstance, where conflicting mandatory state legislation is present (*cf.* pp. 5-7, *supra*).[11] The same standard has been adopted by the Fifth, Sixth, and Seventh Circuits.[12] *Cf. Mitchell* v. *DeMario Jewelry, Inc.*, 361 U.S. 288, 291-292, 296 (1960).

Petitioners urge that this Court allow district courts to exercise an essentially standardless and unfettered discretion. Their position that "discretion" allows different district judges to read the basic remedial provision of Title VII (Section 706(g), 42 U.S.C. § 2000e-5(g)) in fundamentally different ways invites arbitrary or willful decisions, *cf. Langnes* v. *Green, supra*. This result would

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[10] *Accord: Schultz* v. *Parke*, 413 F.2d 1364 (5th Cir. 1964); *Wirtz* v. *B. B. Saxon Co.*, 365 F.2d 457 (5th Cir. 1966).

[11] Subsequently, the Fourth Circuit has affirmed another district court's denial of back pay based on different "special circumstances," *Roberts* v. *Hermitage Cotton Mills, Inc.*, 498 F.2d 1397 (4th Cir. 1974), *aff'g* 8 EPD ¶ 9589 (D.S.C. 1973). Moreover, back pay will be limited to compensation for actual losses, as in *Lea* v. *Cone Mills Corp.*, 438 F.2d 86 (4th Cir. 1971) (Co. Pet. App. 47).

[12] See, *e.g.*, *Johnson* v. *Goodyear Tire & Rubber Co., supra*, 491 F.2d at 1375; *Pettway* v. *American Cast Iron Pipe Co., supra*, 494 F.2d at 252-253; *Head* v. *Timken Roller Bearing Co., supra*, 486 F.2d at 876; *Bowe* v. *Colgate-Palmolive Co., supra*, 416 F.2d at 719-720.

be at odds with the thrust of Title VII as remedial legislation of national scope.

The legislative history of Section 706(g) demonstrates the purpose for which Congress confided discretion to the district courts:

> The provisions of this subsection are intended to give the courts *wide discretion* exercising their equitable powers *to fashion the most complete relief possible.* In dealing with the present section 706(g) the courts have stressed that *the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole,* and that the attainment of this objective rests not only upon the elimination of the particular unlawful practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination. [emphasis added]

Conference Committee of the House and Senate, Section-by-Section Analysis of H.R. 1746, reprinted by Subcommittee on Labor of the Senate Committee on Labor and Public Welfare in *Legislative History of the Equal Employment Opportunity Act of 1972* (1972), pp. 1844, 1848.

The Court of Appeals correctly applied the "special circumstances" test.

C. *The Court of Appeals Properly Rejected the Trial Court's Findings of Special Circumstances.*

Without fully or accurately setting out what facts and principles the courts below relied on, Petitioner Albemarle attacks the Court of Appeals' failure to excuse it from liability because of purported "special circumstances" (Co.

Pet. 9-11). Those facts and principles show that the Petition raises no significant issue of whether "special circumstances" were present here.

Albemarle incorrectly asserts that the Fourth Circuit held the question of Petitioners' good faith "*totally irrelevant* to the question of back pay" (Co. Pet. 9, emphasis supplied). The Court of Appeals made no such holding; the Court simply ruled that the district court erred in denying back pay because it had found no "bad-faith" Title VII violations by Petitioners (Co. Pet. App. 43-46). The Court of Appeals decision is consistent with this Court's pronouncement on "intent" in *Griggs* v. *Duke, Power Co., supra.*[13] Appellate courts have uniformly held that "good faith" imposes no bar to a back pay award.[14]

Similarly, Albemarle misstates the issue in contending that a "tardy" assertion of Respondents' back pay claim "prejudiced" Petitioner (Co. Pet. 10). In fact Petitioner

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[13] [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability . . . Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." 401 U.S. at 432.

[14] See, *e.g.*, *Robinson* v. *Lorillard Corp., supra,* 444 F.2d at 804; *Johnson* v. *Goodyear Tire & Rubber Co., supra,* 491 F.2d at 1376; *Pettway* v. *American Cast Iron Pipe Co., supra,* 494 F.2d at 253; *Baxter* v. *Savannah Sugar Refining Corp., supra,* 495 at F.2d 443; *Carey* v. *Greyhound Bus Co., Inc.,* 500 F.2d 1372, 1378-79 (5th Cir. 1974); *Head* v. *Timken Roller Bearing Co., supra,* 486 F.2d at 876; *Waters* v. *Wisconsin Steel Works of Int'l Harvester Co.,* —— F.2d ——, 8 EPD ¶9658 (7th Cir. 1974) at pp. 5787-88.

The two Eighth Circuit cases cited by Albemarle—*United States* v. *St. Louis-San Francisco Ry.*, 464 F.2d 301 (1972), *cert. denied* 409 U.S. 1116 (1973); and *United States* v. *N. L. Industries, Inc.*, 479 F.2d 354 (1973)—do not turn on the effect of good faith or its absence, but on the proof of causal relationship between discrimination and economic injury and on the effect of notice of changes in the law.

had express notice that Respondents sought back pay over one year before the start of trial. Moreover, as the Fourth Circuit noted, the defenses to back pay in this case are the same as the general defenses to the claim for injunctive relief (Co. Pet. App. 44).[15] Nevertheless, Albemarle relies on a memorandum filed early in the case in which Respondents stated that they sought no "money damages . . . for any member of the class *not before the court*" (Co. Pet. 10 n.10) (emphasis supplied). Before the trial, the district court entered an order on Albemarle's motion requiring non-plaintiff back pay claimants to file individual claim forms.[16] Nearly one hundred persons (the majority of the class) filed such claims which were, therefore, individually "before the court" at trial. Petitioners were not prejudiced by the assertion of the class back pay claim below.[17]

Albemarle argues further that back pay should be denied because the Company might not have dragged out this litigation for so long, had it had specific notice that its unlawful discrimination would prove so costly (Co. Pet. 10). This plea is hardly cognizable in a court of equity sitting in a Title VII case. The enactment of Title VII was suf-

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[15] This ruling is in accord with rulings of the Third, Fourth, and Fifth Circuits in cases where the back pay claim, although not even raised until after trial, was allowed. *Rosen* v. *Public Service Gas & Electric Co.*, 409 F.2d 775, 780 n.20 (3rd Cir. 1973); *Robinson* v. *Lorillard Corp., supra*, 444 F.2d at 803; and *United States* v. *Hayes International Corp.*, 456 F.2d 112, 121 (5th Cir. 1972).

[16] Orders entered June 15, 1971 and July 8, 1971.

[17] Albemarle also argued below that the early disclaimer should now bar the back pay remedy, but the district court refused to rely on this ground, and the Court of Appeals rejected it. A similar disclaimer was no bar to back pay in *Robinson* v. *Lorillard Corp., supra*.

ficient legal notice to discriminatory employers, see *Johnson* v. *Goodyear Tire & Rubber Co., supra,* 491 F.2d at 1377.

Moreover, the district court has not yet determined how much back pay particular class members are due; that is its assigned task on remand. Whether or not, or to what extent, potential liability would be affected by the equitable factors Albemarle asserts as "special circumstances" cannot be determined at this stage.

D. *Class Back Pay Is Compatible With Rule 23 and the Congressional Purpose Expressed in Title VII.*

Both Petitioners argue that as a general proposition class back pay cannot be awarded consistent with the provisions of Rule 23, Federal Rules of Civil Procedure, and the Congressional intent underlying Title VII. (See Co. Pet. 11, U. Pet. 12-13.) These same arguments have been uniformly rejected by the Circuits, at least six of which now recognize the availability of class back pay, see nn. 14, 15, *supra.*

Albemarle opines that a Rule 23 proceeding is "inherently" inappropriate for a Title VII back pay case (Co. Pet. 11). But the Advisory Committee's Notes, 39 F.R.D. 69, 102 (1966), specifically state that the authors of amended Rule 23 contemplated its use for civil rights cases. See *Robinson* v. *Lorillard Corp., supra,* 444 F.2d at 801-802. Petitioners' theory that *each* class member should be required to process his individual EEOC charge and thereby qualify as a named plaintiff blinks at the whole purpose of the Rule 23 amendments permitting like claims to be joined.[18]

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[18] In the leading case of *Oatis* v. *Crown-Zellerbach Corp.*, 398 F.2d 496, 499 (5th Cir. 1968), the Court held:

> Racial discrimination is by definition class discrimination, and to require a multiplicity of separate, identical charges

Finally, the Fourth Circuit's standard does not conflict with the Congressional policy favoring an opportunity for conciliation (cf. Co. Pet. 11, U. Pet. 12-13). That policy is well served by the requirement that a Title VII class action may only be maintained after exhaustion of administrative remedies before the EEOC upon a charge "like or related to" the subject matter of the suit. See, *e.g.*, *Sanchez* v. *Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1971); *Miller* v. *International Paper Co.*, 408 F.2d 283, 290-291 (5th Cir. 1969). Once such a charge has been filed, giving EEOC and respondents an opportunity to conciliate the allegations of discrimination, further EEOC charges from other class members would be superfluous, *Pettway* v. *American Cast Iron Pipe Co.*, *supra*, 494 F.2d at 256; and they may, without filing redundant administrative charges, join in the class representative's lawsuit, *Oatis* v. *Crown-Zellerbach Corp.*, 398 F.2d 496, 499 (5th Cir. 1968); *Bowe* v. *Colgate Palmolive Co.*, *supra*, 416 F.2d at 720. The contrary rule urged by Petitioners would frustrate the goal of providing meaningful conciliation opportunities. It would allow a discriminatory employer or union to evade charges of class-wide or systemic discrimination with impunity and to confront only the individual claims of the person who files the EEOC charge. Such a result would be squarely contrary to Congress' basic purpose in enacting Title VII.

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before the EEOC, filed against the same employer, as a prerequisite to relief through resort to the court would frustrate our system of justice and order.

Accord: Bowe v. *Colgate-Palmolive Co.*, *supra*, 416 F.2d at 720.

II.

This Court Should Not Review the Testing Decision.

A. *The Court of Appeals Correctly Considered the EEOC Guidelines in Evaluating and Rejecting Albemarle's Validation Study.*

The decision below is consistent with the holding and spirit of *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), which requires that Title VII courts prohibit use of discriminatory tests not shown to measure an employee's ability to succeed on the job. The facts are strikingly similar to those of *Griggs;* Albemarle attempts to distinguish itself from Duke Power solely on the basis of its belated validation study.

The Court of Appeals did not reject that study by requiring "detailed and rigid compliance" with the EEOC Guidelines on Employee Selection Procedures, as Albemarle claims (Co. Pet. 13). Rather, it criticized the expert's validation methods for severe inadequacies that render his conclusions unreliable and insufficient as proof of a "manifest relationship" between test success and job performance (see Co. Pet. App. 37-43).[19]

The majority opinion carefully analyzed the validation study's defects and evaluated the propriety of applying the EEOC Guidelines standards. The opinion's common-sense analysis supports its legal conclusion that, as illustrated by the facts here, the Guidelines do generally set out appro-

[19] Even if the study were held to have proved what it purports to show—limited and partial test validity—it would not justify the Company's overbroad test usage, see p. 5, *supra*. Albemarle's testing is thus "unvalidated" in the same sense as Duke Power's.

priate standards for this case (Co. Pet. App. 38-42).[20] This is far from the slavish adherence to dry technicalities with which Albermarle charges the court below.

B. *The Court of Appeals Properly Ordered That Albemarle Be Enjoined From Using Unvalidated Discriminatory Tests.*

The court below acted properly in directing the district court to enjoin the testing program. Since Albemarle's defense failed to prove the tests job-related, *Griggs* forbids their current use. Nothing in the Court of Appeals opinion or the EEOC Guidelines would prevent the Company from utilizing a testing program *after* it had been properly shown to be "manifestly job related." Yet Petitioner seeks an individual exemption from the rule of *Griggs:* it seeks leave to use tests detrimental to black employees *before* proving them valid. Indeed, Albemarle's argument is little more than a request for license to delay compliance with Title VII for a few more years.[21] Not only does the Company urge that black employees be made to wait patiently for equal job opportunities while it

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[20] Moreover, those Guidelines are reasonable and reflect a general professional consensus, as numerous appellate courts have noted in following *Griggs*' suggestion that the courts accord great deference to the Guidelines. See, *e.g., United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418, 456 (5th Cir. 1971), *cert. denied* 406 U.S. 906 (1972); *United States* v. *Georgia Power Co.*, 474 F.2d 906, 913 (5th Cir. 1973); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 221 (5th Cir. 1974). *Cf. Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Commission*, 482 F.2d 1333, 1337 n.6 (1973); *Vulcan Society* v. *Civil Service Commission*, 490 F.2d 387, 394 n.8 (2nd Cir. 1974); *Carter* v. *Gallagher*, 452 F.2d 315, 320, 326, *adopted in relevant part*, 452 F.2d 327 (8th Cir. 1971) (en banc), *cert. denied* 406 U.S. 950 (1972).

[21] Since the mandate below was stayed, the Company presumably continues to apply its tests, ten years after Title VII made them unlawful and nearly four years after the *Griggs* decision.

litigates interminably in defense of its discredited tests; Albemarle boldly asserts that by refusing its proposal the Fourth Circuit abused its *remedial* discretion (Co. Pet. 14-15).

The order and burden of proof established for the testing issue in *Griggs* would be subverted by adoption of Albemarle's argument. Respondents have made out their case for relief under *Griggs* by proving that the tests have an adverse impact on black employees. Albemarle cannot ask plaintiffs, who have met their initial burden, to stand patiently by as laborers while their employer seeks "ultimately" to meet its burden (Co. Pet. 14).

CONCLUSION

The Petitions for a Writ of Certiorari should be denied.

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I.

OPINIONS BELOW

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II.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on February 20, 1973. A timely petition for rehearing en banc was granted on June 25, 1973. After briefing to oral argument before the en banc court, a question of appellate procedure was certified to This Court by the Court of Appeals on December 6, 1973. The opinion of This Court on the question certified was delivered on June 17, 1974. Pursuant thereto, the Court of Appeals, on July 22, 1974, vacated its earlier order granting the petition for rehearing en banc and denied Petitioner's petition for rehearing. A petition for a writ of certiorari to the Court of Appeals for the Fourth Circuit was filed on October 7, 1974 and was granted on December 16, 1974.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

III.

STATUTES AND REGULATIONS INVOLVED

A. Section 703(h) of the Civil Rights Act of 1964, P. L. 88-352, 78 Stat. 255, 42 U.S.C. §2000e-2(h):

"Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d))."

B. Section 706(g) of the Civil Rights Act of 1964, P. L. 88-352, 78 Stat. 255, 42 U.S.C. §2000e-5(g):

"If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against

shall operate to reduce the back pay otherwise allowable."

* * *

C. Rule 23, Federal Rules of Civil Procedure.

D. The "Guidelines on Employment Selection Procedures" 35 F.R. 12,333 (August 1, 1970); 29 CFR §§1607.1-1607.14.

This has been reprinted in the Single Appendix hereto at pages 305-320.

IV.

QUESTIONS PRESENTED FOR REVIEW

A. Whether the District Court's refusal to enjoin Albemarle's use of employment tests was error as a matter of law.

B. Whether the Court of Appeals usurped the powers and function of the District Court by failing to remand the issues on testing.

C. Whether the District Court had traditional equitable discretion to determine whether back pay was an appropriate remedy.

D. Whether a class action for back pay under Rule 23 of the Federal Rules of Civil Procedure is inherently inconsistent with the Congressional intent behind the remedial provisions of Title VII, particularly as to class members who have not filed a charge with the Equal Employment Opportunity Commission.

V.

STATEMENT OF THE CASE

This is an action brought on August 25, 1966 by four black employees[1] of Petitioner's Roanoke Rapids, North Carolina pulp and paper mill as a private class action under Title VII of the Civil Rights Act of 1964. (A.6)[2]

The Kraft paper mill at Roanoke Rapids began operations in 1907, with a single paper machine producing about twenty tons of paper per day using unsophisticated wood procurement and preparation, and elementary papermaking operations, machinery and controls. (A. 88)

In the 1950's, Albemarle Paper Manufacturing Company, which had acquired the mill, began to modernize and install the technologically sophisticated machinery and equipment necessary to bring the mill to its present 1,000-ton per day capacity and to make the mill efficient and competitive with other mills. (Plaintiffs' Exhibit No. 30, p.56; Plaintiffs' Exhibit No. 36A, pp. 68-69)

Today the Roanoke Rapids mill is a modern, highly complex facility, employing approximately 650 people, which operates continuously, 24 hours a day, 7 days a week, 362 days a year.

A pulp and paper mill may be simply described[3] as a complex facility in which raw materials, principally wood,

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[1] One of the four, Theodore Daniels, has since withdrawn from case. *See* Order of the District Court entered July 19, 1971.

[2] References to the Single Appendix herein are designated (A.____); references to the official transcript are designated (R. ____); other references to the record are made to the individual documents cited.

[3] The description of the papermaking process, *infra*, derives from Ainsworth, *Paper, The Fifth Wonder*, (2d Ed. 1959). The District Judge observed the process as it exists at the Roanoke Rapids Mill during his view of the facility. Defendant's Exhibit No. 19. *See also* Plaintiff's Exhibit No. 34A, pp. 321-367.

chemicals and water are combined in a cooking or digesting operation to separate wood fiber to be made into paper from the lignin and other materials found in the raw wood, the separated fiber in the form of pulp being delivered to complex, intricate paper milling machines and the residue lignin, chemicals, water and waste being recycled through massive recovery furnaces, precipitation and filtration equipment to recover the chemicals and to prevent air and water pollution.

Like nearly all paper mills, the Roanoke Rapids mill is organized into functionally distinct departments. In order to provide on-the-job training for functionally related jobs and to overcome the lack of an adequate specialized labor market in the locality, each of the departments is organized into functionally related lines of progression through which employees can move into more demanding jobs as vacancies occur, on the basis of seniority, ability and experience. Entry into a line of progression is generally from the Extra Board, a reservoir of employees available as needed to staff entry level jobs in the various lines of progression. (A. 88-89, 104)

Each of the functionally distinct departments contributes to the central purposes of paper-making. The Woodyard Department gathers and prepares the wood for further processing.[4]

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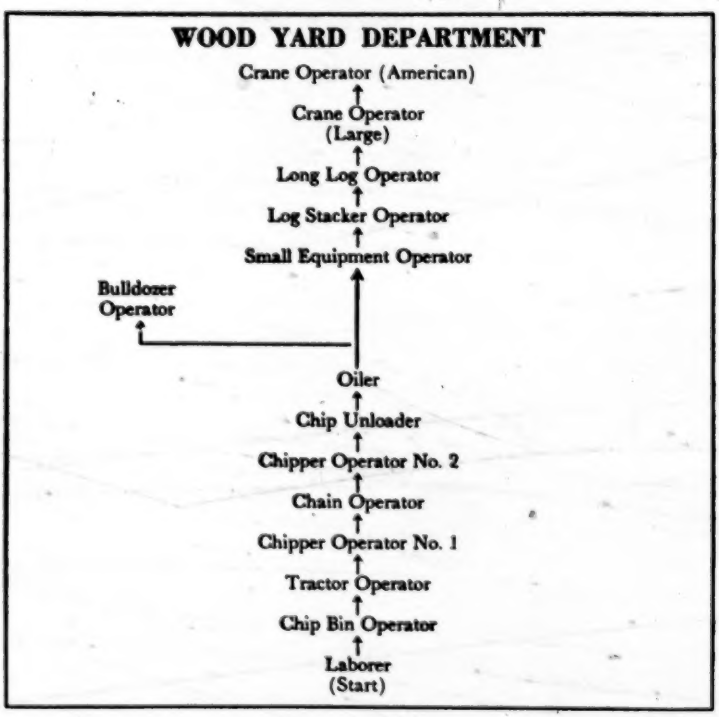
[4] The wood is delivered (by both railroad and truck) in the form of chips, sawdust and logs. The Chip Unloader registers chips and sawdust receipts, records the condition of the particular shipment, operates a screen to take foreign matters out of the chips or sawdust, and then operates conveyor equipment to distribute the screened material.

Logs are unloaded by the Large Crane Operator and then are unloaded by the Long Log Stacker Operator. Next the logs are debarked and converted into chips by means of a conveyor system, debarking drums, and Chippers (Nos. 1 and 2). The Chain Operator controls the conveyor from the woodpile through the debarking drum. The Chipper

At the time of the trial in this case, the Woodyard Department was organized into a line of progression for seniority and promotion, training and flexibility of the workforce as follows (A.109):



Operator controls from the debarking drums through the Chippers. From the Chipper, the chips are conveyed to a chip bin controlled by the Chip Bin Operator. In the new (1967) modern long log operation, one man, the Long Log Operator, by remote control debarks and converts logs up to 40 feet in length into chips.

Auxiliary functions in the Woodyard are performed by the Oiler, who services the equipment in the Woodyard, the Bulldozer Operator, who spreads chips on the chip piles and reclaims chips for the conveyers, and the Small Equipment Operator, who operates small cranes, bulldozers and front-end loaders as needed in the Woodyard.

The Pulp Mill Department is concerned with the conversion of wood chips into pulp,[5] through a cooking operation in a chemical solution under high temperature and pressure to separate the wood fibers for subsequent conversion into paper, with the residues in the cooking solutions being sent to a recovery operation so that the very expensive chemicals can be reclaimed for subsequent recycling.[6]

At the time of trial in this case, the Pulp Mill Department was organized into lines of progression for seniority and promotion, training and flexibility of the workforce as follows (A. 109):

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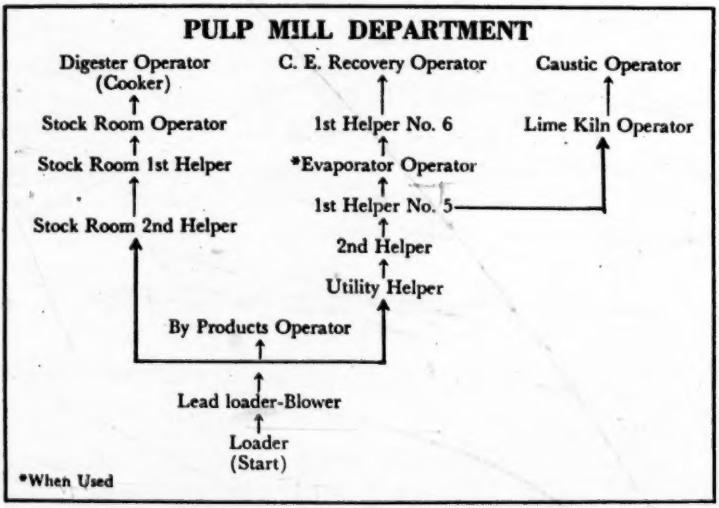
[5] Soft wood is basically 50% cellulose, 30% lignin and 20% carbohydrates, etc. The cellulose is composed of innumerable fibers, finer than a human hair and 2 to 4 millimeters in length. The fibers are held together by the lignin. The pulp process separates the fibers by dissolving the lignin binder in chemical solutions, which in proper concentration does not seriously attack the fibers. The sodium chemicals used in the process are reclaimed and reused. While the basic process is simple, its accomplishment on a scale required by a modern paper mill is technologically complex.

[6] The cooking process is the responsibility of the Digester Operator, who directs the charging of the cookers with the proper mix of pine, hardwood chips, sawdust and chemical solutions and controls the temperature and pressures at which this operation must be carried out.

Following the cooking process, the cellulose fibers are washed clean and the clean fibers are then put in storage tanks for use on the paper machines. The washing operation is the responsibility of the Stock Room Operator with the assistance of the Stock Room 1st Helper and 2nd Helper.

The C. E. Recovery Operator, with the assistance of the 1st Helper No. 6, Evaporator Operator, 1st Helper No. 5, 2nd Helper, and Utility Helper, is responsible for the intricate process of operating the recovery boiler for purposes of reclaiming the chemicals used in the cooking process. In that connection, the Caustic Operator, with the help of the Lime Kiln Operator, is responsible for reclaiming lime for use in the cookers.



The B Paper Mill[7] is concerned with the conversion of pulp into paper.[8] At the time of trial in this case, the B

[7] At the time of trial, the mill also had an "A Paper Mill" which served the same functions as the B Paper Mill on a much smaller scale with less intricate machinery. The A Paper Mill is no longer in operation.

[8] From the Storage tanks at the end of the pulp operation, the pulp goes to the Stock Room (Seater Room in old mills), where it goes through refiners which cut the fibers into the desired lengths and reject that part of the pulp not usable.

After passing through the Stock Room, where the pulp is refined and subjected to chemical analysis by the Stock Room Operator helped by the Stock Room 1st and 2nd Helpers, the pulp is introduced into a Fordrinier paper machine. The pulp is there distributed in a thin layer onto a moving wire screen and then moves continuously through a series of presses and steam-heated driers which remove water, control thickness and convert the pulp into a continuous sheet of paper. This intricate process must be under the constant control of the work force, who must make the proper adjustments in speed of flow, pressure, temperature, and other factors in order to keep the paper of acceptable weight, moisture content and configuration. As the paper sheet leaves the paper machine, it is wound onto a reel. The

Paper Mill was organized into lines of progression for seniority and promotion, training and flexibility of the workforce as follows (A. 109):

B PAPER MILL DEPARTMENT

PAPER MACHINE	STOCK ROOM
Line of Progression	*Line of Progression*
Machine Tender	Stock Room Operator
↑	↑
Back Tender	Stock Room 1st Helper
↑	↑
Third Hand	Stock Room 2nd Helper
↑	
Fourth Hand	
↑	
Fifth Hand	
↑	
Sixth Hand	
↑	
Seventh Hand	
↑	
Spare Hand No. 4 (Start)	

In 1965, the Mill began operation of a technologically complex modern Power Plant Department to generate and distribute electric energy to the mill and steam to the Pulp Mill and Paper Mills in an amount necessary to supply the needs of a small city. (Plaintiffs' Exhibit No. 49, p. 139). This separate highly automated and controlled department is organized into a line of progression as follows (A. 109):

POWER PLANT DEPARTMENT

Power Plant Operator
↑
1st Helper
↑
2nd Helper
(Start)

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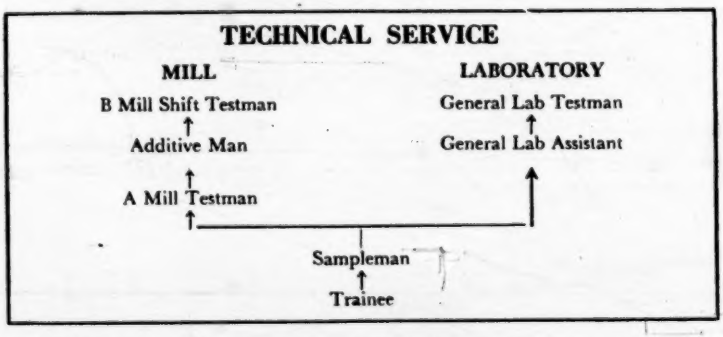
paper machine operates continuously. As one reel of paper is filled and removed, a new reel begins to wind without an interruption in the process. The reel is then transferred to a winder, where the paper is cut and sized.

The Technical Service Department is really the quality control department of the mill, controlling the quality of the raw materials used and of the products produced throughout the entire 24-hour-a-day operation. The quality control employees must have a working knowledge of physics and chemistry, although a college degree is not required. The department is organized into lines of progression as follows (A. 109):



There are also several additional support-function departments at the mill.[9]

With modernization of the mill in the early 1950's[10]

[9] The Boiler Room Department operates small package boilers for the production of steam when a supplement is needed. (Plaintiffs' Exhibit No. 34A, pp. 364-365).

The Service Department services the whole mill with general labor services. (Plaintiffs' Exhibit No. 34A, pp. 330-331). There is also a Shipping Crew in the B Mill which weighs and bands the rolls of paper at the loading docks and places them in either freight cars or over-the-road trucks for shipment. (Plaintiffs' Exhibit No. 34A, pp. 341-344)

[10] Since that time, certain mill functions have been discontinued. The Kamyr Department, which prepared surplus pulp for sale to other mills, was discontinued in 1969. (A. 245) The Product Department B Mill Finishing Crew was discontinued in 1969. (A. 244) The A Paper Mill was shut down in August of 1971, restarted in part (one machine) in 1972, and shut down entirely again in 1974.

Albemarle found itself in need of a significantly greater number of skilled employees. (A. 346) The Company did not have such employees in its employ and there was no supply of skilled and experienced paperworkers in the local labor market. (A. 347-348) In an effort to develop and train its own pool of employees who could, with training, progress to higher skilled jobs in the lines of progression, Albemarle began to require that applicants for its skilled lines of progression have a high school education. (Plaintiffs' Exhibit No. 31, p. 219) When Albemarle found that the high school education requirement by itself was not an adequate predictor of job success, its Personnel Manager was directed to develop a better procedure for the selection of employees for successful progression in the skilled lines of progression. (A. 329, 339) The Personnel Manager, who was professionally trained in industrial psychology, selected the Revised Beta Examination (Beta)[11] and the Bennett Mechanical Aptitude Test (Bennett).[12] In order to verify that the tests were a useful predictor of job success, he undertook a "concurrent validation study" by comparing of the test results of a sampling of employees in the skilled lines of progression with supervisory ratings of the employees. (A. 99, 330) He determined that the Beta correlated positively with job performance (A. 330) and its use at the mill continued. (A. 99)[13] In 1963, as part of the continuing effort to improve the quality of its workforce, Petitioner

[11] A professionally developed non-verbal test designed to measure the intelligence of illiterate and non-English speaking persons.

[12] A professionally developed test for mechanical ability and verbal skills.

[13] Petitioner found that the Bennett test did not validate for its operations and use of this test was discontinued sometime in 1963 or before. There is no evidence that any employee or potential employee was disqualified by reason of his score on Bennett.

added the Wonderlic Test Forms A and B[14] (A. 331) and, beginning in 1963, a new applicant for employment in the skilled lines of progression was required to have a high school education or its equivalent (A. 345) and to achieve a cut-off score of 100 on the Revised Beta Examination and 18 on either the Wonderlic A test or the Wonderlic B test. (A. 99, 100)

The purpose for which Albemarle had adopted the educational and testing requirements was better to predict employees' job success in the skilled lines of progression. At no time did Albemarle impose these requirements for jobs in unskilled lines of progression. In fact, by reason of changes in mill operation, merger of certain lines of progression, and Albemarle's efforts to apply these testing requirements only where needed, there was a continued reduction in the number of job categories to which the requirements applied during the entire period from the date of inception of the requirements to the date of trial. Thus, during the period up to September 23, 1968, applicants for entry into a total of fifteen lines of progression situated in eight departments were required to fulfill the testing requirements.[15] The collective bargaining agreement with the union effective September 23, 1968 permitted Albemarle to make

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[14] A professionally developed test of mental ability and reading skills.

[15] These were: Woodyard Department—Yard Crew line of progression; Pulp Mill Department—Digester Operator, C. E. Recovery Operator and Caustic Operator lines of progression; A Paper Mill Department—Paper Machine and Beater Room lines of progression; B Paper Mill Department—Paper Machine and Stock Room lines of progression; Product Department—Finishing Crew-Rewinder Operator, Finishing Crew Sheeter Operator and Shipping Crew lines of progression; Power Plant Department—Power Plant Operator line of progression; Technical Service Department—Mill and Laboratory lines of progression; and Boiler Room Department—Boiler Operator line of progression.

certain changes in the lines of progression at the mill and, as a result, Albemarle was able to reduce the test coverage to applicants for entry into a total of twelve lines of progression situated in six departments.[16] Thereafter, further automation and curtailment of certain mill operations occurred (A. 90, 231-232) and by the time of trial in 1971, applicants for entry into a total of only eight lines of progression, situated in four departments, were required to fulfill the testing requirements.[17]

Prior to the passage of the Civil Rights Act of 1964, there were predominantly white skilled lines of progression and predominantly black unskilled lines of progression. (A. 89) The skilled lines of progression led generally to the higher paying jobs in the mill. (Plaintiffs' Exhibit Nos. 12-15, Appendices A) The unskilled jobs, however, are among the highest paying jobs in the Roanoke Rapids area—jobs which paid on the average more than those of policemen, schoolteachers, and most other jobs in the area. (Defendant Albemarle's Exhibit Nos. 11-17).

At the time of passage of the Civil Rights Act of 1964, there were two Extra Boards, one feeding the skilled lines of progression and another feeding the unskilled lines of pro-

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[16] These were: Pulp Mill Department—Digester Operator, C. E. Recovery Operator and Caustic Operator lines of progression; B Paper Mill—Paper Machine and Stock Room lines of progression; Product Department (B Paper Mill)—Rewinder Operator, Sheeter Operator, and Shipping Crew lines of progression; Technical Service Department—Mill and Laboratory lines of progression; A Paper Mill Department—Paper Machine line of progression; and Power Plant Department—Power Plant Operator line of progression.

[17] These were: Pulp Mill Department—Digester Operator, C. E. Recovery Operator and Caustic Operator lines of progression; B Paper Mill Department—Paper Machine and Stock Room lines of progression; Power Plant Department—Power Plant Operator line of progression; and Technical Service Department—Mill and Laboratory lines of progression.

gression. Employees were placed on the respective Extra Boards either as new employees or by election to take Extra Board work rather than lay-off in cases of reduction in force. (A. 104) Prior to 1965, the Extra board for the skilled lines of progression was predominantly white, that for the unskilled lines was predominantly black. (A. 104)

With the passage of Title VII on July 2, 1964, to be effective July 2, 1965, Petitioner undertook a series of steps to insure that its employment practices would be in compliance with the law. Commencing in 1964, Petitioner began an affirmative recruiting program to obtain black graduates from high schools for its apprentice maintenance program and for its other skilled lines of progression. (Plaintiffs' Exhibit No. 32, pp. 531-533) While blacks had not been barred from taking the employment tests, after passage of Title VII, Albemarle affirmatively sought to have all of its black employees who had a high school education take the tests so as to make them eligible for transfer into skilled lines of progression. (A. 105) Thereafter, in 1965, Petitioner waived the educational requirement as to all incumbent employees and again sought to have all black employees take the tests. (A. 105) In conjunction with the union, Petitioner in 1968, organized and funded a school at which its employees could acquire the verbal skills necessary to perform jobs in the skilled line of progression. (R. 1181-1186).

As the law developed under Title VII it became apparent that seniority systems or other work conditions which were racially neutral but which had the effect of perpetuating past discrimination could be found violative of the Act.[18]

In light of the judicial interpretations of the Act, Peti-

[18] In *Quarles* v. *Philip Morris,* 279 F.Supp. 505, 516 (E.D. Va. 1968), the Court found "it is also apparent that Congress did not intend to freeze an entire generation of Negro employees into dis-

tioner, at the first opportunity, took further affirmative measures to ensure equal opportunities. In 1968, the two Extra Boards were merged into a single board. (A. 245-246) Employees who had formerly been in unskilled lines of progression were given temporary assignments to skilled lines even though such employees did not meet test and educational requirements, if it reasonably appeared from past experience that the employees might be able to do some of the lower jobs in the skilled lines of progression. (A. 246)

The collective bargaining agreement at the Roanoke Rapids mill which ran for the term September 18, 1965 through September 15, 1968, provided a system of "job seniority" in a line of progression for advancement. (A. 286-290) There was a provision for transfers from one line of progression to another and from one department to another, but there was no seniority right to transfer and the transferee did not carry either his rate of pay or his seniority with him. It thus appeared to the Company that under the developing law the seniority provisions of the collective bargaining agreement at Roanoke Rapids "tended to perpetuate past discrimination" as had the seniority provisions involved in *Quarles* and *Crown-Zellerbach*.

Therefore, in 1968, in the first contract negotiations following the *Quarles* and *Crown-Zellerbach* decisions, the

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criminatory patterns that existed before the act," and held a seniority system which tends to perpetuate past discrimination is not bona fide under Section 703(h) of Title VII.

On March 26, 1968, the United States District Court for the Eastern District of Louisiana, in the case of *United States* v. *Local 189, Papermakers Union (Crown-Zellerbach)*, 301 F.Supp. 906 (E.D. La. 1969) *aff'd.*, 416 F.2d 980 (5th Cir.), *cert. denied*, 397 U.S. 919 (1970) entered a temporary injunction ordering the Crown-Zellerbach Corporation to abolish the "job seniority" system at its paper mill in Bogalusa, Louisiana, and to replace it with a "mill seniority" system with transfer provisions including carrying seniority to a new job with red-circling of rates.

Company and the Unions negotiated a contract clause to provide for transfers on the basis of "mill seniority," [19] for the carrying of "mill seniority" with the transferee for purposes of advancement and for the "red-circling" of the transferee's rate of pay (i.e., if an employee transferred to a lower paying job, he would be paid his old rate of pay until his rate in the new line of progression caught up to his old rate). (A. 98) This collective bargaining agreement was for a term beginning September 23, 1968. The relevant seniority provisions were sections 10.2.2 and 10.2.3. (A. 292-293)

In May, 1966, charges were filed with the Equal Employment Opportuntity Commission by Joe P. Moody, Theodore Daniels, Henry Hill and Arthur Mitchell, alleging discrimination because of their race. (A. 273-282)

These charges were served on defendants on August 11, 1966, and the EEOC investigator gave defendant, Albemarle Paper Manufacturing Company, fifteen days, i.e., until August 26, 1966, to answer. However, before the Company could respond, on August 24, 1966 the first EEOC Guidelines on Employment Testing Procedures[20] were published and on August 25, 1966 the complaint in this case was filed in the United States District Court for the Eastern District of North Carolina. (A. 6-10) The Complaint simply alleged in very general terms discrimination on account of race against Plaintiffs in violation of Title VII. The prayer was for injunctive and other equitable relief on behalf of Plaintiffs and the class they claimed to represent. (A. 10) By motion for summary judgment, Albemarle immediately raised the question whether Plaintiffs could bring a class action

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[19] While the contract did not, strictly speaking, provide for mill seniority, the system negotiated was tantamount to mill seniority. (A. 233-234)

[20] BNA, Daily Labor Report No. 174 (Sept. 7, 1966).

under Rule 23.[21] (See Motion for Summary Judgment filed October 5, 1966.) In their brief in opposition to that motion, Plaintiffs maintained the position:

> "It is important to understand the exact nature of the class relief being sought by Plaintiffs. *No money damages are sought for any member of the class not before the Court, nor is specific relief sought for any member of the class not before the Court.* The only relief sought for the class as a whole is that defendants be enjoined from treating the class as a separate group and discriminating against the class as a whole in the future." (A. 13-14) (Emphasis added).

The District Judge, John D. Larkins, Jr., overruled the motion for summary judgment, but in the same order granted a motion to dismiss the International Union as a defendant on the ground it had not been named in the charges filed with the Equal Employment Opportunity Commission. (A. 16-20)

Following Judge Larkins' ruling, the case proceeded to the discovery stage. While the case was in this posture, on October 31, 1968, the assets of the Mill were sold to Hoerner Waldorf Corporation, a Delaware Corporation, which in turn assigned them to a new Albemarle Paper Company, a Delaware Corporation. The proceeds of the sale were assigned to First Alpaco Corporation which later merged into Ethyl Corporation, the parent of the old Albemarle Paper Company.[22] (Plaintiffs' Exhibit 36B pp. 67-69)

On March 12, 1970, the United States District Court for the Middle District of North Carolina, decided the case of

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[21] FED. R. CIV. P. 23.

[22] For convenience, the term "Albemarle" is used in referring to the employer of Respondents.

Robinson v. *Lorillard Corp.*, 319 F.Supp. 835 (M.D.N.C. 1970) *aff'd.* 444 F.2d 791 (4th Cir.), *petition for cert. dismissed,* 404 U.S. 1006 (1971), in which District Judge Eugene A. Gordon, in a Title VII case, on motion first made after his findings on the merits of the case, *in his discretion,* allowed damages in the form of back pay. Thereafter, in 1970, the issue of damages was injected into this case for the first time. (A. 28-29) On June 25, 1970, Plaintiffs moved to join Hoerner Waldorf Corporation, Ethyl Corporation, First Alpaco Corporation and the new Albemarle Paper Company (Delaware) as parties defendant. The old Albemarle Paper Company (Virginia) filed a motion to dismiss on August 20, 1970. The District Judge, John D. Larkins, Jr., issued his opinion and order on these motions on September 29, 1970, (A. 30-39) denying the motion to dismiss, permitting the joinder of the parties defendant[23] and stating:

> "Rule 54(c) of the Federal Rules of Civil Procedure provides in part: 'except as to a party against whom a judgment is entered by default every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.' The possibility of an award of money damages upon a determination of liability is still with us. It is not yet the proper time to drop the plaintiffs' claims, which are, at least, litigable." (A. 37-38)

Following This Court's decision in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), the management at the Mill promptly employed Dr. Joseph Tiffin, a professor at Purdue University, and an eminent industrial psychologist. Using the standard "concurrent" method of validation, Dr. Tiffin

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[23] Process was never served on First Alpaco Corporation and it has never participated in this case.

conducted further validation studies on the tests in use for certain of the skilled lines of progression. (A. 165-166) As a result of his study, Dr. Tiffin concluded that the tests could reasonably be used for both hiring and promotion for most of the jobs in the Mill. (A. 438)

In the meantime, this case was transferred from Judge John D. Larkins, Jr. to Judge Franklin T. Dupree, Jr., who, at a conference of attorneys on May 17, 1971, on motion of Defendant, ordered the case set for trial beginning at 10 a.m., July 26, 1971, at Raleigh, North Carolina.

First on May 28, 1971 and again on June 15, 1971, the District Court ordered plaintiffs to answer Defendants supplemental interrogatory, which read:

> "List the specific names of each employee or former employee whose personnel record or records in any way establishes or tends to establish any discrimination by Albemarle Paper Company in its employment practices and explain how such a record or records show discrimination giving the specific dates and instances." (A. 44, 46).

By order dated July 8, 1971, the District Judge defined the class, provided for notice to the class, ruled that damages might be recovered in this action and stated his intention to have all such claims for individual monetary relief tried with other issues at the trial, reserving the right to refer some of such issues to a master if the claims were too numerous or complicated to be completed at trial. (A. 50-52)

On July 10, 1971, the parties agreed to a Stipulation of Facts, which included most of the relevant facts in the case, (A. 86) and on July 19, 1971, the parties agreed to and executed an elaborate pretrial order.

In the Pretrial Order, Plaintiffs listed 134 witnesses of whom 128 were:

> "Black employees or former employees of Albemarle Paper Company who may be called to testify about their terms, conditions, privileges of employment such as jobs held, wages received and testimony going to the question of backpay." (See Pretrial Order entered July 19, 1971 at pp. 78-90)

The case came on for trial before the Honorable Franklin T. Dupree, Jr., promptly at 10:00 a.m., Monday, July 26, 1971. There were four major issues: (1) Whether there should be injunctive relief with respect to the seniority system at the mill; (2) whether the testing and high school educational requirements were unlawful; (3) whether there should be back pay and (4) whether there should be attorney fees.

In an effort to reduce the scope of the trial, Albemarle consented to the entry of an order providing mill seniority and red-circle rates for members of the class by representing in its opening statement as follows:

> "If the Court please, I think there are four issues here and I will address myself to them very briefly. First, the injunctive relief. The defendants believe that no injunction is warranted in this case. We believe that whatever relief they may have been entitled to some years ago we took care of in 1968, and that under the circumstances we would fight very hard not to be enjoined. However, without admitting any violation of Title VII, we have concluded to say to your Honor this morning that insofar as an injunction to provide plant seniority for these people along the lines of the system that we set forth in the proposed consent agreement, a copy of which I have left on your desk, we would not burden the Court today with all the evidence that we

> think bears on that issue. I think it's all in the depositions. And without admitting any guilt on our part, we can eliminate that part of the case because we would not object to an order along those lines." (A. 114-115)

The trial of the case consumed eight full trial days and one day for the Court to view the Mill. There were literally scores of members of Plaintiffs' class in attendance at the trial. The District Judge did not limit the evidence in any way. Plaintiffs called eleven employee, or former employee, witnesses and introduced the depositions of five others.

The District Judge made extensive findings of fact, found the Company's testing program "job-related" and declined to enjoin its use. In his discretion the Judge denied back pay to plaintiffs. However, the Court ordered a mill seniority system and, finding the tests sufficient for the purpose, proscribed the use of a high school education requirement for employment. (See A. 497, 499-502)

Plaintiffs appealed to the United States Court of Appeals for the Fourth Circuit and the case was heard by a panel, consisting of Circuit Judge J. Braxton Craven and Senior Circuit Judges, Herbert S. Boreman and Albert V. Bryan, whose decision is best explained by them:

> "The district court refused to order the abolition of or changes in the pre-employment testing procedures used by Albemarle. Plaintiffs appeal from the district court's determination. Judge Boreman concurs with Judge Craven in reversing and remanding to the district court on this issue. Judge Bryan dissents.
>
> "The district court also refused to award the plaintiffs back pay. Judge Bryan concurs with Judge Craven in reversing the district court on this issue. Judge Boreman dissents.

> "The effect of this division in the court is to reverse and remand the district court's determination as to the testing procedures and the refusal to award back pay." (A. 531)

Defendants asked for a rehearing and made a suggestion of rehearing en banc which was granted on June 25, 1973. Supplemental briefs were filed and argument was heard on October 2, 1973.

On December 6, 1973, Chief Circuit Judge Clement F. Haynsworth certified to This Court the following:

> "Under 28 U.S.C. §46 and Rule 35 of the Federal Rules of Appellate Procedure, may a senior circuit judge, a member of the initial hearing panel, vote in the determination of the question of whether or not the case should be reheard *en banc*?" (A. 540)

The certification also stated:

> "If the *en banc* court reaches the merits, the tentative vote is that it will modify the panel decision with respect to an award of back pay." (A. 540)

On June 17, 1974 This Court answered the certified question in the negative and on July 22, 1974 the United States Court of Appeals for the Fourth Circuit denied Defendants' petition for rehearing.

On October 7, 1974 Defendants filed a petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit with This Court. The writ was granted on December 16, 1974.

VI.

SUMMARY OF ARGUMENT

A. The District Court Correctly Refused To Enjoin The Use Of Albemarle's Testing Procedures.

1. Introduction

This case involves the interpretation of principles laid down in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1970), with respect to the use of employment tests.

2. The Evidence In This Case Shows Albemarle's Tests Were Not Discriminatory.

There was no demonstration in the trial court that Albemarle's tests, the Beta and the Wonderlic A & B, had a racially disparate effect upon a proper statistical universe —i.e. otherwise qualified blacks employed in, or candidates for employment at the Roanoke Rapids mill. *Mayor* v. *Educational Equality League,* 415 U.S. 605, 620 (1974). The tests not having been shown to discriminate in the first place, there was no basis to proscribe their use. *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973); *Bridgeport Guardians, Inc.* v. *Civil Service Commission,* 482 F.2d 1333 (2d Cir. 1973); *Hester* v. *Southern Railway Co.,* 497 F.2d 1374 (5th Cir. 1974); *Woods* v. *North American Rockwell Corp.,* 480 F.2d 644 (10th Cir. 1973).

3. Albemarle Demonstrated The Tests To Be A Reasonable Measure Of Job Performance.

(a) *The District Court Found That Albemarle's Tests Were Job Related.*

The District Court found, based in part on a view of the mill, that certain native intelligence and reading skills were required for the safe and efficient operation of the mill. That Court also found that Albemarle's tests had

undergone validation studies and had been proven to be job related.

(b) *The Findings Of The District Court Have Not Been Shown To Be Erroneous.*

The attack on the tests in the Court of Appeals was not that the tests were not job related, but that Albemarle had not proven them to be job-related in strict accordance with the EEOC Guidelines. The proper test is not compliance with the guidelines, *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86, 94 (1973), but whether the tests are proven job related to the satisfaction of the Court. *Vulcan Society* v. *Civil Service Commission*, 490 F.2d 387, 394 (2d Cir. 1973); *Castro* v. *Beecher*, 459 F.2d 725 (1st Cir. 1972); *Bridgeport Guardians, Inc.* v. *Civil Service Commission*, 482 F. 2d 1333 (2d Cir. 1973); *United States* v. *Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973). Relying primarily on the guidelines and on contentions of fact raised for the first time on appeal, the Court of Appeals erroneously found fault with Albemarle's proof of job relatedness.

(i) Job Analysis

Albemarle's expert conducted an empirical validation study which correlated test scores with supervisory ratings of actual job performance. In such a situation a written job analysis is unnecessary and its absence is irrelevant to the integrity of the correlations.

(ii) Supervisor Ratings

Test validations do not fail as a matter of law upon an unsupported presumption that supervisors' ratings are racially biased. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). There is no basis for a presumption of supervisors' bias in the first place and such bias clearly could not have affected the correlations obtained in this case.

(iii) Business Necessity

The objections raised concerning the use of a test for lines of progression in which the test had not been specifically shown to validate are based primarily on the Court of Appeals' misassumption of facts and, in any event, go to the utilization of the tests, not their job-relatedness. The actual use made of the tests by Albemarle is reasonable and lawful.

B. In Any Event The Court Of Appeals Erred In Not Remanding The Testing Issue To The District Court.

When new standards of proof are set forth, simple fairness requires the party against whom the new rule is invoked be afforded an opportunity to present its evidence. *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 807 (1973); *England* v. *Louisiana Medical Examiners,* 375 U.S. 411 (1964); *United States* v. *Georgia Power Co.,* 474 F.2d 906 (5th Cir. 1973). Especially is this true where, as here, the Court of Appeals engaged in its own determination of the facts.

C. The District Court Had Traditional Equitable Discretion To Determine Whether Back Pay Was An Appropriate Remedy.

1. Title VII Leaves The Award Or Denial Of Back Pay To The General Equitable Discretion Of The District Courts.

The plain language of the Statute expressly vests the District Court with the discretion to fashion remedies as "may" be appropriate, which "may include reinstatement or hiring of employees, with or without back pay." Section 706(g), 42 U.S.C. §2000e-5(g). The Fourth Circuit's reversal of the District Judge's denial was based on its adoptive "special circumstances" standard. This standard, which mandates an award of back pay in every instance

save exceptional cases, contravenes the legislative intent behind the express language of the Act. *Curtis* v. *Loether*, 415 U.S. 189 (1974); *Kober* v. *Westinghouse Electric Co.*, 480 F.2d 240 (3d Cir. 1973); 111 Cong. Rec. 12819 (1964).

2. The Discretion Of A Trial Court Regarding The Back Pay Remedy Should Be Guided By Traditional Equitable Principles.

Trial courts in fashioning decrees to remedy violations of Title VII should be free to apply equitable considerations in light of all the facts and circumstances of the case. Two of those factors were cited by the District Judge below: the good faith of Albemarle, and the plaintiffs' tardiness, amounting to laches, in presenting the back pay claims. *United States* v. *Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973); *Rental Development Corp. of America* v. *Lavery*, 304 F.2d 839, 842 (9th Cir. 1962).

3. Even Under A "Special Circumstances" Standard, The District Court Was Justified In Denying Back Pay.

Even if a "special circumstances" rule is correct, the factors cited by the District Court make this an exceptional case.

D. Back Pay Should Not Be Awarded To Class Members Who Did Not File Charges With The Equal Employment Opportunity Commission.

Back pay is individual redress for damages actually suffered as distinct from class wide prospective remedial measures. The previous filing of a charge with the EEOC is a jurisdictional requirement for individuals seeking relief under Title VII. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). The device of a class action under Rule 23 of

the Federal Rules of Civil Procedure may not be manipulated to confer jurisdiction over such individual claims where it does not otherwise exist. FED. R. CIV. P. 82; *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973); *Snyder* v. *Harris*, 394 U.S. 332 (1969); *Weiner* v. *Bank of King of Prussia*, 358 F. Supp. 684 (E.D. Pa. 1973); *Sperberg* v. *Firestone Tire & Rubber Co.*, 61 F.R.D. 70 (N.D. Ohio, 1973).

VII.

ARGUMENT

A. The District Court Correctly Refused To Enjoin The Use Of Albemarle's Testing Procedures.

1. INTRODUCTION

This case presents to the Court several questions either not reached or not definitively settled in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). In *Griggs* the Court considered the use of a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) the standard is not shown to be significantly related to successful job performance, (b) the requirement operates to disqualify Negroes at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees.

In this case the District Court found that the jobs in Albemarle's skilled lines of progression formerly had been filled only by white employees, made no finding with respect to whether Albemarle's tests had a disparate racial effect, and finally found that, in any event, Albemarle's tests were significantly related to successful job performance.

2. THE EVIDENCE IN THIS CASE SHOWS ALBEMARLE'S TESTS WERE NOT DISCRIMINATORY.

In any Title VII case, plaintiff bears the burden of showing *prima facie* discrimination. *McDonald Douglas Corp.* v. *Green,* 411 U.S. 792, 802 (1973); *Woods* v. *North American Rockwell Corp.,* 480 F.2d 644, 647 (10th Cir. 1973). In the testing context plaintiffs most often make this showing with statistics from tests previously administered by the defendant employer. *Castro* v. *Beecher,* 459 F.2d 725 (1st Cir. 1972); *Bridgeport Guardians, Inc.* v. *Civil Service Commission,* 482 F.2d 1333 (2d Cir. 1973); *United States* v. *Georgia Power Co.,* 474 F.2d 906 (5th Cir. 1973); *Carter* v. *Gallagher,* 452 F.2d 315 (8th Cir.), *cert. denied,* 406 U.S. 950 (1972). But whatever the method, failure to show that a test has a disparate effect on the minority group has been and should be fatal to a Title VII plaintiff's case, *Bridgeport, supra* at 1339; *Hester* v. *Southern Railway Co.,* 497 F.2d 1374, 1381 (5th Cir. 1974); *Woods, supra,* at 647.

This threshold question of whether Albemarle's tests had a disparate effect on the members of the class in this case was never specifically addressed in the District Court and the District Court made no findings of fact as to any discriminatory effect of the tests. Indeed, plaintiffs' proposed findings did not even include a provision bearing on this issue.

The *Amicus Curiae,* Equal Employment Opportunity Commission (hereinafter EEOC), tried to correct this glaring deficiency in plaintiffs' case, in its brief[24] to the Court of Appeals. Purportedly utilizing plaintiffs' Exhibit No. 10,[25]

[24] All briefs filed in the Court of Appeals were included in the record sent to this Court.

[25] Exhibit No. 10 is supposedly a composite of all of Albemarle's personnel records, which plaintiffs had taken two weeks to microfilm. No

Amicus Curiae contended that it showed that on Wonderlic A blacks averaged 17 and whites averaged 24.9, with 96% of the whites and 64% of the blacks obtaining a passing score, and that on Wonderlic B blacks averaged 14.8 and whites averaged 21.9. *Amicus Curiae* did not point out that the same exhibit also showed that on the Beta, blacks averaged 104.20, whites 107.56 against a cut-off score of 100.00. But in their Supplemental Brief on Rehearing at page 36, the *Amici Curiae* (the EEOC now joined by the United States) conceded:

> ". . . the evidence on the Beta alone showed only a slight, and perhaps not statistically significant impact." (Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae on Rehearing En Banc, p. 36).

Nevertheless, the majority panel of the Court of Appeals began its discussion of testing by noting:

> "The plaintiffs made a sufficient showing below that Albemarle's testing procedures have a racial impact." (A. 515)

In support of that conclusion the Court of Appeals Panel cited in a footnote some statistics concerning the Wonderlic tests, but never mentioned the Beta.

Thus, the finding by the Court of Appeals Panel is first of all grievously and astonishingly deficient in enjoining Albemarle's use of the Beta, as to which there was absolutely no evidence, either presented to the District Court or otherwise, to show a disparate racial effect. As Dr. Richard Barrett

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specific contentions based on Exhibit No. 10 were ever made in the District Court despite Albemarle's strenuous efforts to elicit them. (See R. 52-54.)

pointed out in his article, Barrett, *Gray Areas in Black and White Testing*, 46 Harv. Bus. Rev. 92, 93 (1968):

> "A test that places no special obstacle in the path of Negro applicants cannot be said to be discriminatory."[26]

As a consequence of this failure of proof by plaintiffs, Albemarle is clearly entitled to a reversal of that portion of the Court of Appeals' judgment proscribing further use of the Beta.

But even as to Wonderlic, plaintiffs' proof is deficient on the threshold question of whether the test was discriminatory. The Court of Appeals Panel concluded that this requirement was satisfied by reference to Exhibit No. 10 and to general statistics. But, while these factors may be the basis for speculation that the Wonderlic tests exclude more blacks than whites, they are not proof of discriminatory effect at the mill at Roanoke Rapids.

The calculation and factual extrapolation from Exhibit No. 10 was never presented to the District Court; in fact, it was before the Court of Appeals that the possibility was first raised that Exhibit No. 10 could be utilized as proof of disparate effect, and then the suggestion was made not by plaintiffs, but by the *Amicus Curiae*, EEOC. The District Court thus was never afforded an opportunity to consider the force of this supposed evidence.[27] Further, Albemarle was never afforded the opportunity to demonstrate at trial that the conclusion drawn by the EEOC and the Court of Appeals

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[26] This conclusion was confirmed by plaintiffs' other expert, Dr. Katzell, as well. (A. 403).

[27] Nor was the District Court ever given the study, E. F. Wonderlic and Assoc. Inc., *Negro Norms, A Study of 38,452 Job Applicants for Affirmative Action Programs* (1972) because it was filed for the first time with the Court of Appeals and served on counsel for Albemarle along with Appellants' Reply Brief in August, 1972.

from Exhibit No. 10 was erroneous for the reason that the statistical universe included test scores of employees who could hardly read or write and whose verbal facility was no more than 1 on the Wonderlic (R. 1135-6), and who were therefore not potential candidates for the skilled lines of progression.[28]

Having failed to prove disparate effect of the tests at trial, plaintiffs may not rely on the suggestion in *Griggs*, 401 U.S. at 430, n. 6, that the Wonderlic has been shown to have a disparate effect in other cases. If meaningful conclusions are to be drawn a test "must be evaluated in the setting in which it is used." *Georgia Power, supra* at 912.[29] A rule to the contrary, aside from being illogical, would be inequitable in imposing the heavy financial burden of validation on an employer even though his tests do not discriminate against minorities. In other words, if the test does not discriminate in the first place, it should not have to be validated.

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[28] Since the District Court found that ability to read and write is a job and safety requirement for the skilled lines of progression, the inclusion of illiterate persons in the statistics relied on by the Court of Appeals renders its conclusions about differential impact meaningless. This Court has recognized with respect to racial statistics that unless "the relevant universe for comparison purposes" is limited to potentially qualified persons, "simplistic percentage comparisons undertaken by the Court of Appeals lack real meaning." *Mayor* v. *Educational Equality League*, 415 U.S. 605, 620 (1974). And see *Harper* v. *Mayor and City Council of Baltimore*, 359 F. Supp. 1187, 1193 (D. Md.), *modified, sub nom. Harper* v. *Kloster*, 486 F.2d 1134 (4th Cir. 1973); *Chance* v. *Board of Examiners*, 330 F. Supp. 203, 214 (S.D. N.Y. 1971); *aff'd.*, 458 F.2d 1167 (2nd Cir. 1972).

[29] Even Dr. Katzell, one of plaintiffs' experts, acknowledged that, in order to determine whether a particular test has a racially disparate impact, it would be necessary to study its impact upon the particular group involved. (A. 394-5).

3. Albemarle Demonstrated Its Tests To Be A Reasonable Measure Of Job Performance.

This Court held in *Griggs* at page 436:

> "Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance."

Thus, the question presented here is whether, even if the unproven assumption that Albemarle's tests had a racially disparate effect were accepted, the Court of Appeals could hold as a matter of law that Albemarle failed to make an adequate demonstration that its tests are a reasonable measure of job performance. Albemarle submits that the Court of Appeals was in error in making that determination.

(a) *Defendants' Tests Were Found To Be Job Related By The District Court.*

The tests used by Albemarle were professionally developed to measure the very attributes found by the District Court to be required for the skilled lines of progression. The Beta measures the intelligence of the taker, *even though he is illiterate,* (Katzell deposition, A. 360-2); the District Court found that a high degree of native intelligence was a necessary attribute for workers in the skilled lines of progression. (A. 494) The Wonderlic tests also measure general mental ability and indicate the taker's ability to read and to understand what he has read. (Katzell deposition, A. 362-3); the District Court found that reading ability was also a necessary requirement for workers in the skilled lines of progression. (A. 497) Without more, therefore, it would appear that the

tests were reasonable measures of a prospective employee's ability to perform the skilled jobs in the mill.

But Albemarle's case does not rest merely upon this basis since, through validation studies, Albemarle's tests were found to correlate significantly with actual job performance at the mill. Before use of the Beta was instituted, in 1958, a concurrent validation study established positive correlations.[30] Further, after this Court's decision in *Griggs*, Albemarle retained an unquestioned expert in industrial psychology to conduct a further validation study.[31] As found by the District Court this study confirmed the validity and utility of the tests:

> "This court has also found as a fact that a certain level of native intelligence is required for the safe and efficient operation of Albemarle's often complicated and sophisticated machinery. The personnel tests administered at the plant have undergone validation studies and have been proven to be job related. The defendants have carried the burden of proof in proving that these tests are "necessary for the safe and efficient operation of the business" and are, therefore, permitted by the Act. However, the high school education requirement used in conjunction with the testing requirements is unlawful in that the personnel tests alone are adequate to measure the mental ability and reading skills required for the job classifications." (A. 497)

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[30] See, supra, p. 11.

[31] The study was conducted by use of the "concurrent validation" method. Ten skill-related job groupings were selected on the basis of skill level and content of the jobs, as being typical of jobs in the skilled lines of progression. Each employee in each group was rated in comparison with each other employee in the group to obtain a ranking of job performance and statistical correlation was performed to determine correlation between job performance and test results. (A. 490). The same method was also expressly approved in *Watkins* v. *Scott Paper Co.*, ___ F. Supp. ___, 6 FEP Cases 511, 537 (S.D. Ala. 1973).

It is clear, therefore, that the District Judge, who was the trier of fact in this case, had no doubt that Albemarle had demonstrated that its tests were related to performance on the job.

(b) *The Findings Of The District Court Have Not Been Shown To Be Erroneous.*

Plaintiffs' contention in the Court of Appeals was not that Albemarle's tests were not job related (indeed the EEOC's Brief to the Court of Appeals as *Amicus Curiae* at p. 32 conceded that "they may very well be job related"). Rather, plaintiffs contended that Albemarle had not proven job relatedness in the manner required by the EEOC guidelines in that (1) Dr. Tiffin's study had not been shown to have fulfilled all of the technical requirements of the guidelines, and (2) Dr. Tiffin had not been shown to have gone through all the procedures detailed in American Psychological Association, Inc., *Standards for Educational and Psychological Tests and Manuals* (1966) (Plaintiffs Ex. 71), and that Albemarle had not presented evidence on extraneous issues not raised in the District Court.

Other Courts of Appeals reaching the question have held that an employer may satisfy the job relatedness standard of *Griggs* independently of the specific requirements of the EEOC guidelines. *Castro* v. *Beecher,* 459 F.2d 725, 737-38 (1st Cir. 1972); *Guardians Ass'n* v. *Civil Service Commission,* 490 F.2d 400, 403 n. 1 (2nd Cir. 1973); *United States* v. *Georgia Power Co.,* 474 F.2d 906, 913 (5th Cir. 1973). The error of the Court of Appeals panel below was in equating EEOC suggested technical methodology with acceptable standards of judicial proof of job relatedness. "Experience teaches that the preferred method of today may be the re-

jected one of tomorrow.[32] What is required is simply that an examination must be 'shown to bear a demonstrable relationship to successful performance of the jobs for which it was used,' *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431." *Vulcan Society* v. *Civil Service Commission*, 490 F.2d 387, 394 (2d Cir. 1973) (Friendly, J.) (Footnote added).

Previous opinions of this Court make clear that deference to agency interpretation should be limited, when, as here, the interpretation derives from a nonadversary proceeding, *Fishgold* v. *Sullivan Drydock and Repair Corp.*, 328 U.S. 275 (1946), and when the interpretation intrudes into an area where a court's expertise exceeds the agency's.[33] In the case of testing, the EEOC guidelines have not been subject to adversarial scrutiny. The 1970 guidelines themselves state:

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[32] The First "Guidelines on Employment Testing Procedures" (Plaintiffs Ex. 27A) adopted by the EEOC on August 24, 1966, one day before this case was brought stated *inter alia:*

> "The Commission accordingly interprets 'professionally developed ability to test' to mean a test which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicants ability to perform a particular job or class or jobs."
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> * * *

and advocated "* * * that tests be judged against job performance rather than by what they claim to measure."

The Guidelines on Employee Selection Procedures adopted on August 1, 1970 by the EEOC superseded the 1966 guidelines, and added stringent and technical standards with respect to job relatedness.

Further amended guidelines are presently under consideration by the Equal Employment Opportunity Coordinating Council (EEOCC).

[33] *Barlow* v. *Collins*, 397 U.S. 159, 166 (1970); *NLRB* v. *Boeing Co.*, 412 U.S. 67, 76-77 (1973) (dictum). Like statutory construction and principles of equity, the allocation of proof and the proper weight to be accorded evidence are matters properly within the province of the courts.

> "Because the material herein is interpretive in nature, the provisions of the Administrative Procedure Act (5 U.S.C. §533) requiring notice of proposed rule making, opportunity for public participation, and delay in effective date are inapplicable."[34]

Indeed, This Court, in *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86, 94 (1973) has held with respect to the EEOC "Guidelines on Discrimination Because of National Origin":

> "The Commission's more recent interpretation of the statute in the guideline relied on by the District Court is no doubt entitled to great deference but that deference must have limits where, as here, application of the guideline would be inconsistent with an obvious congressional intent not to reach the employment practice in question." (Citations omitted)

i. Job Analysis

The principal defect found by the Court of Appeals was that Dr. Tiffin had not conducted a detailed job analysis in connection with his validation study in the manner required by the EEOC Guidelines. Before discussing the particular reasons for which the Court of Appeals found a job analysis necessary, it will be useful to discuss when, in general, a job analysis should or should not be required.

[34] Thus the intricate technical burden imposed on employers by the 1970 EEOC Guidelines on testing marked a radical departure from previous practice, without the benefit of any input by employers.

When the proposed amended guidelines containing similarly restrictive standards were opened for public comment by the EEOCC, the impact of those guidelines on industry was made clear. The people who testified described them as "unworkable," "incomprehensible," "technically unsound," "too stringent," "beyond the state of the art in psychology," "ambiguous, yet restrictive," "unnecessary," "punitive," and, as one person said, "just irrational, unreasonable, and impossible." BNA, Daily Labor Report, No. 8 (Jan. 13, 1975).

A validation study may be conducted in a variety of factual circumstances for various purposes, and may employ various strategies such as content, construct, or criterion related, i.e., predictive or concurrent studies.

Thus, when a test publisher or psychologist sets out to devise and market a test, he must conduct a "job analysis" in order to demonstrate to potential clients the job content or duties for which the test has been correlated.

Similarly, if an expert psychologist were employed to set up a testing program for a particular plant, he would first of all study the jobs to learn what abilities were required, in order to obtain an indication of what tests might be valid job predictors; he would then select a test and, by empirical study, would determine if it correlated with job performance.

By contrast, the validation study here was intended to examine the validity of the tests already in use. The problem, therefore, was not to select among various tests to measure some unknown job content, but to determine if an existing test correlated with known job performance. In this context the preliminary "job analysis" for selecting the test was superfluous.[35]

The fundamental point overlooked by the Court of Appeals is that a test has almost no chance of correlating with job performance ratings unless it in fact measures critical job attributes. *Boston Chapter, NAACP* v. *Beecher*, 504 F.2d 1017, 1024 (1st Cir. 1974); *Vulcan Society, supra*, 490 F.2d

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[35] American Psychological Ass'n, Inc., *Standards for Educational and Psychological Tests and Manuals* (1966) (A. 1520-58), relied upon by Plaintiffs, expressly states at the outset (Standard A1):

> "Not all the standards in this report will apply to any one particular test. A standard may be ignored if it is irrelevant in the light of the purpose of the test and claims made for it. . . ." (A. 1592)

at 396. In light of the high statistical significance of the correlations here, the Court of Appeals Panel's speculation that only a written job analysis could assure that the supervisors and the tests were measuring the same thing exalts form over substance.

While for good reasons Albemarle does not have written job descriptions, (A. 223-24) the job categories for wage purposes are the result of union-employer negotiations. The job content is directly related to the machinery and equipment on which the job holder works, and the lines of progression are designed to group functionally related jobs for training purposes, as well as seniority, especially in the skilled lines of progression. (A. 211-212) Thus, the characteristics of the jobs are clearly understood.

Further, Dr. Tiffin was very familiar with paper mills,[36] having made validation studies for International Paper Company, The Mead Paper Corp., Marathon Paper Company and Gulf State Paper Company and having been consultant to the American Paper Institute from 1965 for the purpose of analyzing the use of the personnel tests being made by the member companies of that association.[37]

Thus, to say the tests were not proven to be job related, because Dr. Tiffin did not write down in his report what he knew about the jobs is unjustified as the dissenting Senior Circuit Judge aptly noted:

> "Secondly, in view of the findings by the [District] Court that validation studies had been applied to the

[36] In Kraft Mills the jobs and machinery are basically the same, varying only with the technological advancement of the particular mill. Therefore, the organization for training and progression is quite similar in all mills. (R. 822-826)

[37] See Defendants Exhibit No. 22 (A. 439-57); A. 161. Dr. Tiffin's work was favorably received in *Stevenson* v. *International Paper Co.*, 352 F.Supp. 230 (S.D. Ala. 1972).

personnel tests and that the tests had been proved to be job related, I cannot join in the determination that discrimination resulted from the absence of 'job analysis.' It seems to me that these findings necessarily recognize that the equivalent of 'job analysis' was utilized. In rating the employees, the jobs' features were undeniably considered, for the supervisors were unquestionably familiar with these elements."

ii. Supervisors' Ratings

In his validation study, Dr. Tiffin used the "paired comparison" method of obtaining job success criterion ratings from supervisors.[38] Judge Dupree described the process in *his* findings of facts:

> "Each employee in a job grouping was individually rated in comparison to every other individual employee in that grouping to obtain a ranking of job performance. The ratings took into consideration the elements of work behavior and job success. This rating method was performed twice by two different supervisors making independent evaluations. Neither of the raters had access to or knowledge of the sample employees' performance on the aptitude tests. The results of the dual ratings were then averaged to obtain the final job rating of the employees within each specific unit." (A. 490)

Thus, the supervisors were asked only the most elemental question: "which of two of the employees who work for you can do the job better?" The Court of Appeals finds this simple question to be a "vague standard."

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[38] This method was specifically approved in *Watkins* v. *Scott Paper Co.*, ... F. Supp. ....., 6 F.E.P. Cases 511, 537 (S.D. Ala. 1973).

Citing one case, not in point,[39] and a stray quotation from a law review article[40] and the EEOC guidelines,[41], the Court of Appeals concluded:

> "We agree that some form of job analysis resulting in specific and objective criteria for supervisory ratings is crucial to a proper concurrent validation study. *See, Western Addition Community Organization* v. *Alioto,* 340 F.Supp. 1351, 1354-55 (N.D. Cal. 1972). To require less is to leave the job relatedness requirement largely to the good faith of the employer and his supervisors. The complaining class is entitled to more under the Act."

The Court of Appeals Panel's overemphasis of "job analysis" as "crucial" was apparently based on a confusion between "content validity" studies such as that attempted in *Western Addition Community Organization* v. *Alioto,* 340 F. Supp. 1351 (N.D. Cal. 1972), cited by the Court, and the more reliable "empirical validation" successfully performed in this case. Unquestionably "[t]he cornerstone in the construction of a content valid examination is the job analysis." *Kirkland* v. *Department of Correctional Services,* 374 F.Supp. 1361, 1373 (S.D. N.Y. 1974), since the tasks identi-

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[39] *Rowe* v. *General Motors Corp.*, 457 F.2d 348, 358 (5th Cir. 1972), which questioned the subjective recommendations of foreman for employees to be promoted to foreman, where almost no blacks were ever recommended. This is an entirely different evaluation from that involved here.

[40] Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion,* 82 Harv. L. Rev. 1598, 1662 (1969), the quotation from which has no citation to any scientific authority to support it.

[41] "In view of the possibility of bias inherent in subjective evaluation, supervisory rating techniques should be carefully developed, and the ratings should be closely examined for evidence of bias." 29 C.F.R. § 1607.5(b)(4) (1970).

fied in the analysis provide the only criteria against which to evaluate the test. In empirical validation studies, however, where the test can be measured against actual job performance rather than a mere description of job performance, the job analysis is far less important.

> "In the jargon of psychometrics, predictive [empirical] validation involves comparing relative performance on a given test with subsequent job performance.
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> * * *
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> Content validation of a test, on the other hand, requires that an analysis of the job involved be undertaken to determine what characteristics are essential for the adequate performance of that job." *Pennsylvania* v. *Glickman,* 370 F.Supp. 724, 732 (W.D. Pa. 1974).

The thrust of the law review quotation and that of the guidelines is based upon the premise that blacks, generally, perform less well on tests than whites, but perform as well on the job and therefore, if because of bias, supervisors rate blacks lower, this would tend to make the test seem valid when, in fact, it would merely reflect parallel bias. Recent scientific studies find the underlying premise that blacks who do poorly on a valid test do just as well on the job unfounded.[42]

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[42] This premise is, in the jargon, called "differential validity." In one recent study of thirteen validity studies, the author concluded that there is very little evidence of differential validity. Boehm, *Negro-White Differences in Validity of Employment and Training Selection Procedures; Summary of Research Evidence,* 56 Journal of Applied Psychology 33 (1972). *See also* Gael & Grant, *Employment Test Validation for Minority and Nonminority Telephone Company Service Representatives,* 56 Journal of Applied Psychology 135 (1972); Schmidt, Berner & Hunter, *Racial Differences in Validity of Employment Tests: Reality of Illusion* 58 Journal of Applied Psychology 5 (1973).

Aside from the fact that there is no scientific support for that idea, it clearly was not applicable in this case, and was not raised in the District Court.

Only four black employees participated in the validation study conducted by Dr. Tiffin, and those four were all in group No. 8. Therefore, in fact, in nine out of the ten groups studied, racial bias could not have been a factor. Group No. 8 consisted of eight employees (six black and two white) in the jobs of Chipper Unloader, Chipper Operator No. 2 and Chain Operator in the Woodyard. Two of the black employees refused to take the tests, so that four blacks and two whites constituted the group. Both the Beta and the Wonderlic B correlated for Group No. 8. Although Dr. Tiffin had all of his work papers available in Court, he was not asked for the test scores or supervisory ratings of the employees in Group No. 8. Thus, even for Group No. 8, the Court of Appeals Panel relies on a surmise, raised for the first time in the Court of Appeals, that the four blacks did poorly on the tests, and did as well or better on the job than the whites, but that both supervisors rating them independently downgraded their job performance in the precise degree necessary to achieve correlation. The possibility that this could have occurred is obviously remote, and does not provide a basis for invalidating Albemarle's whole testing program.

Further, a supervisor is in the best position to know the relative job performance of his employees. As long as the District Judge, in his role as trier of fact, is satisfied that the supervisor is reporting honestly, the rating cannot be said to be unduly "vague."

In this instance, the Court of Appeals disagreed more with the District Court's factual conclusions than with its legal standard. When the Court of Appeals criticized the lack of

job analysis, it essentially found a failure by Albemarle to meet a burden of proof. The District Court's findings clearly recognized that the burden had been carried. The Court of Appeals' conclusion that this was not enough constitutes a reversal on factual grounds, which was unwarranted since those findings of fact are not "clearly erroneous." FED. R. CIV. P. 52; *Parmer* v. *National Cash Register Co.*, 503 F.2d 275 (6th Cir. 1975); *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948) *modified*, 339 U.S. 960 (1950).

Thus, it is apparent that the Court of Appeals was in error in reversing the District Court on the basis that all supervisory ratings are presumptively biased.[43] This Court has already held that subjective or individual judgments concerning minority employees cannot automatically be equated with racial prejudice. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 803 (1973).

iii. Business Necessity

The Court of Appeals concluded that it was error "to approve the testing procedures for lines of progression not validated" and "to approve requiring applicants to pass two tests for positions where only one test was validated." (A. 519) The Court of Appeals found that Albemarle had not shown that "hiring all employees into a pool is necessary to the safe and efficient operation of its business," nor had it shown that "hiring employees for specific lines of progression is not an acceptable alternative." (A. 519-520)

[43] Most validation studies in the United States, including the United States Training and Employment Service General Aptitude Test Battery (GATB) which is in wide use throughout the United States, are based on supervisory ratings. Thus if the Court of Appeals was correct, tests which Congress has expressly authorized would be presumptively invalid.

It is manifest that these objections of the Court of Appeals go to the manner in which the tests should be utilized and are irrelevant to the question whether the tests are job related. These objections may be grounds for modifying the District Court's order, but they are not grounds for enjoining the use of tests completely, as the Court of Appeals has done.

Furthermore, the objections basically derive from the Court of Appeals Panel's apparent belief that Albemarle was requiring tests "for 14 lines of progression" in "8 departments." Apparently this belief was based on a stipulation of fact which was correct as far as it went, but did not take into account the subsequent evidence at trial which clearly demonstrated that many of such lines of progression and departments no longer existed. (A. 244-245) Although the District Court did not specifically note these changes in the lines of progression (A. 487), the uncontroverted record discloses that at the time of Dr. Tiffin's study, Albemarle was using its tests only for the skilled lines of progression in the Technical Service, Power Plant, B Mill Paper and Pulp Mill Departments, which were the lines Dr. Tiffin was asked to study. (A. 186).

Dr. Tiffin's study found that the Wonderlic A" correlated positively with job performance in all the lines of progression in those departments except the B Paper Mill Stockroom and the Pulp Mill C. E. Recovery Operator lines of progression. So the question really is whether the entire testing program should be cast aside because the

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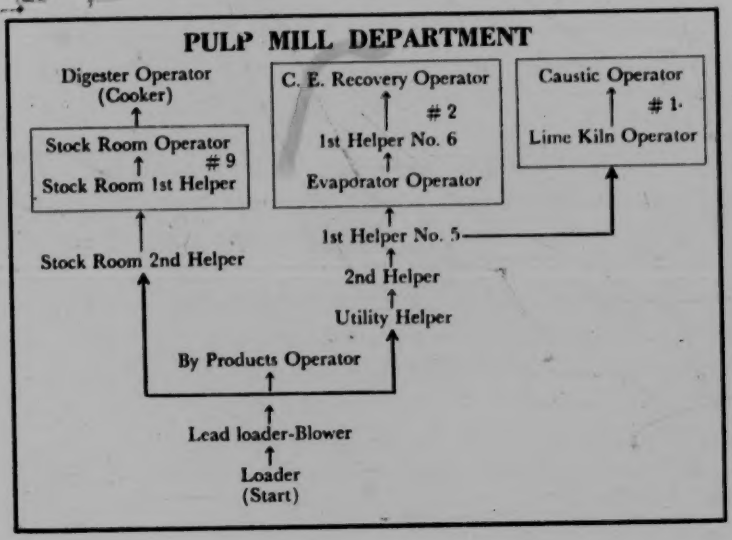
" Wonderlic B scores are examined only in the event Wonderlic A is not passed. See A. 220. Beta's use, of course, is permissible everywhere since it has no disparate effect on blacks and whites. See pp. 29-30, *supra*.

District Court permitted the use of the Wonderlic in two lines of progression—one involving a total of twelve jobs, the other six jobs—or whether on the basis of Dr. Tiffin's findings and the circumstances of the Mill it was reasonable to allow the testing procedure to stand. It is Albemarle's contention that use of tests in both the C.E. Recovery Operator and Stockroom lines was reasonable and appropriate.

In the Pulp Mill Department, the lines of progression do not start with the bottom job but branch out at higher levels so that an employee can be several jobs up the ladder before he will divert into the Digester Operator, the C.E. Recovery Operator or the Caustic Operator line of progression. In the Pulp Mill Department, the Wonderlic A correlated significantly in Groups 9 and 1, but only the Revised Beta had significant correlation in Group 2 in the C.E. Recovery line of progression:



In this department, therefore, clearly Albemarle cannot predict in which line of progression an employee will be needed. To preserve the safe and efficient operation of its pulp mill, it is reasonable to require *all* employees entering this line to pass the Wonderlic A as well as the Beta.

Consequently, it is only as to the B Paper Mill Stockroom line of progression that a specific compelling reason for using the Wonderlic may not have been shown. However, it is unreasonable to disrupt the entire hiring system at the mill for so small a group. Nor does so small an inconsistency destroy the overall conclusion of the expert that it is reasonable to use the Wonderlic for the skilled lines of progression generally.

Finally, the majority opinion holds that Albemarle "has not shown that hiring all employees into a pool is necessary to the safe and efficient operation of its business, nor has it shown that hiring employees for specific lines of progression is not an acceptable alternative." This holding misses the point because the use of a pool is no more discriminatory *per se* than hiring directly into a line of progression. How the hiring is done is what may cause the discrimination. Unless it is assumed that Albemarle is requiring satisfactory test scores as a condition of employment for all applicants for the pool and thereby making the tests indirectly applicable to lines of progression for which the tests are not validated, there is no discrimination by reason of the tests. There is no evidence to support that assumption and no reason to doubt that Albemarle is limiting its tests to potential candidates for the "skilled lines" of progression. The District Court, whose job it was to fashion the remedy in this case, made specific provisions for the operation of the Extra Board or "pool" in its order so as to insure against the possibility of unfairness in its operation.

It is abundantly clear, if not precisely stated, that due to the modernization of the mill and the elimination of various Departments, the Extra Board or "pool" is a device for sharing the available work among the many employees who would otherwise have been completely displaced. For Albemarle it has the advantage of flexibility in work-force.

There was no suggestion made that some other method of handling this situation might be less subject to discriminatory effect. To require Albemarle to conjure up some other system and disprove that it would have less discriminatory effect is unreasonable, if not unreal.[48]

Albemarle respectfully submits that the Court of Appeals had no basis upon which to reverse the District Court's refusal to enjoin its testing program and, therefore, the Court of Appeals should in turn be reversed by this Court.

B. In Any Event The Court Of Appeals Erred In Not Remanding The Issue To The District Court.

The Court of Appeals panel concluded its discussion of testing by stating:

> "Thus we hold that the district court erred in upholding the validity of the pre-employment personnel tests and in refusing to enjoin their use."

The final word of the opinion is simply, "Reversed." Such bare reversal on the testing issues is improper on several

[48] The propriety of a "no alternative" requirement is not clear. Title VII imposes a heavy burden on defendants after a *prima facie* effect on minorities is shown. Imposing impossibly strict standards on private employers collides directly with the business efficiency that is the backbone of ths country's economic power.

grounds and the Court of Appeals Panel should instead have remanded to the District Court with permission to reopen the record.

Even if we were to assume that the Court of Appeals was correct on the merits, its decision has the effect of setting forth the new rule that an employer has the burden of proving job relatedness in strict accordance with the EEOC guidelines and the standards of proof detailed therein. Simple fairness requires that Albemarle, against which the new rule has been invoked, should be afforded an opportunity to present evidence with the new rule in mind. *McDonnell Douglas Corp.* v. *Green, supra; England* v. *Louisiana Medical Examiners,* 375 U.S. 411 (1964). Under practically the same circumstances, the Court of Appeals for the Fifth Circuit has noted:

> "[S]tandards for testing validity comprise a new and complicated area of the law. While the Hite Study did not demonstrate compliance with the Act, we hesitate to penalize this litigant, the first to confront such a demanding burden of proof, for failing to introduce a more rigorous study. Had our standards been articulated at the time of trial, it may be that the company could have proven its compliance. Therefore, rather than now proscribing the testing program which Georgia Power has used, we remand this phase of the case to the trial court with directions to permit the company a reasonably prompt opportunity to validate the testing program applied to the plaintiffs, in accordance with the principles enunciated in this opinion." *Georgia Power supra,* at 917-18.

A bare reversal allowing no further consideration by the District Court is especially inappropriate in light of the further fact that the Court of Appeals Panel under-

took to make factual determinations on issues as to which the District Court did not, and was not requested to make findings.

Thus the Court of Appeals Panel erred in its finding that tests were required at the time of trial in fourteen lines of progression in eight departments; they were in fact being utilized only in eight lines of progression in four departments.[46]

Similarly, in applying the literal language of Section 1607.4(c)(1) of the guidelines, the Court of Appeals said it did not reach the question of whether a testing procedure which takes into account higher-level job requirements is permissible:

> ". . . because of insufficient evidence below as to the time it takes an employee to progress to the higher level job."

No such time computation was made by the District Court because the issue was not injected into the case until the *Amicus Curiae* filed its brief in the Court of Appeals. But in fact the raw data with which to make the computations was in evidence and available to the District Court.[47]

Even worse, the Court of Appeals Panel made a finding as to the disparate racial effect of the Wonderlic test scores based on a document introduced in evidence in the Court of Appeals after all briefs had been filed. Obviously, Albemarle had no chance to probe the evidentiary value of that document, nor did the District Court have

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[46] See *supra*, p. 13.

[47] Plaintiffs' Exhibit No. 10 shows how long it took each employee to promote to each and every job. Hence, to determine how long it, in fact, took to progress from job to job would be a simple matter of computation.

opportunity to pass upon its relevance to or impact on the issues raised in this case.[48]

At the very least, the District Court should have been given the chance to determine the facts upon which issues not presented to the District Court were to be decided. *Commissioner* v. *Duberstein*, 363 U.S. 278, 292-293 (1960).

> "It is not the function of an appellate court to read the transcript of the evidence for the purpose of determining the essential facts before applying the law of the case." *Woods Construction Co.* v. *Pool Construction Co.*, 314 F.2d 405, 407 (10th Cir. 1963).

C. The District Court Had Traditional Equitable Discretion To Determine Whether Back Pay Was An Appropriate Remedy.

1. TITLE VII LEAVES THE AWARD OR DENIAL OF BACK PAY TO THE GENERAL EQUITABLE DISCRETION OF THE DISTRICT COURTS.

In the instant case, the District Court declined to award back pay to the plaintiffs based on the cumulative effect of several equitable factors.[49]

In what was apparently the first Title VII case to do so, the Court of Appeals below reversed the trial judge's discretionary refusal to award back pay by adopting a "special

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[48] See *supra*, pp. 30-31.

[49] First, the court found that no evidence was presented of bad faith non-compliance with Title VII's requirements on the part of Albemarle Paper Company. Second, the court found that in its geographic area Albemarle had consistently paid among the highest wages at all levels of employment. Finally, the court found that Plaintiffs' tardy claims for monetary relief in the form of back pay, coupled with their express disclaimer of any intent to seek such monetary relief for non-named class members at the outset of the instant litigation substantially prejudiced the Defendants. (A. 498)

circumstances" test under which once a violation is found, a back pay award is mandatory absent special circumstances which would render such an award unjust. (A. 523-524)[50] It is submitted that the "special circumstances" test severely distorts Congressional intent, as evidenced by the plain language of Section 706(g) of Title VII, 42 U.S.C. §2000(e)-5(g), and operates to reduce traditional concepts of equitable discretion in the trial courts to a nullity.

Section 706(g), 42 U.S.C. §2000e-5(g), provides that if the district court in a private Title VII action finds that the respondent has intentionally engaged, or is intentionally engaging, in the unlawful employment practice alleged,

> "the Court *may* enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as *may* be appropriate, which *may* include, but is not limited to, reinstatement or hiring of employees, *with or without back pay* . . . or any other equitable relief *as the court deems appropriate.*" (Emphasis added).

Use of the word *may* in defining the enforcement or remedial powers of a court or agency normally signifies the grant of general equitable discretion to invoke, or refrain from invoking, the authority conferred.

The Civil Rights Act of 1964 is replete with careful distinctions between use of the word *shall* and the word *may*.[51]

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[50] Other courts of appeals have since adopted varying versions of the special circumstances test for reviewing the District Courts' Title VII decrees involving back pay. See e.g., *Duhon* v. *Goodyear Tire & Rubber Co.*, 494 F.2d 817, 818 (5th Cir. 1974); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 252-53, (5th Cir. 1974); *Head* v. *Timken Roller Bearing Co.*, 486 F.2d 870, 876 (6th Cir. 1973).

[51] *Compare*, 42 U.S.C. §§2000a, 2000a-1(a), and 2000a-2, *with* 42 U.S.C. §2000e-3(a).

Moreover, the legislative history of Section 706(g) conclusively establishes that the word *may* was intended to confer discretionary remedial powers on the District Courts. In an effort to conform Title VII remedies to those granted to the NLRB under the National Labor Relations Act, 29 U.S.C. §160(c)[52], early versions of the Title VII provided that:

> "If the court finds that the respondent has engaged in or is engaging in an unlawful employment practice . . . the court . . . *shall order* the respondent to take such affirmative action, including reinstatement or hiring of employees, with or without back pay . . ." (H.R. 7152 § 707(e)) (emphasis added).

However, the word *may* was substituted for *shall* in the Mansfield-Dirksen amendment adopted on the Senate floor.[53]

This legislative history demonstrates that the grant of remedial authority in Section 706(g) is inherently equitable in nature and the question of back pay, like that of other forms of equitable relief, is left to the discretion of the trial court.

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[52] Plaintiffs in this case and the Fifth Circuit in *Pettway*, *supra* at 252, attempt to analogize Title VII to the National Labor Relations Act. The analogy should not be drawn, in the first instance, because back pay awards are mandated by use of the word *shall* in the latter. 29 U.S.C. §160(c). Moreover, even the National Labor Relations Board has discretion over back pay awards, unfettered by a special circumstances rule. See *Phelps Dodge* v. *N.L.R.B.*, 313 U.S. 177, 198 (1941).

[53] Senator Dirksen commented that:

> "The mandatory requirement for affirmative action, including reinstatement and backpay, upon a finding of a violation has been revised to read 'may * * * order such affirmative action as may be appropriate, which may include reinstatement and backpay.' " 111 Cong. Rec. 12819 (1964).

Indeed, there has never been any question that the above-quoted language vests the District Courts with discretion in fashioning relief.[54] The question in this case is whether that discretion is properly limited by a "special circumstances" rule or whether it is governed by traditional equitable principles.

Albemarle recognizes that judicial review is not eliminated by the discretionary nature of the District Court's remedial powers under Title VII; the discretion must be exercised consistently with legislative objectives.[55]

In *Griggs* v. *Duke Power Co.*, 401 U.S. at 429-30 (1971) This Court defined the purpose of Title VII as follows:

> "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."

This Court's interpretation is supported not only by the plain language of Title VII, but also by its legislative history. Thus, in the sectional analysis of H.R. 7152 written by the House Judiciary Committee it is stated:

> "The purpose of this title is to eliminate, through the utilization of formal and informal remedial procedures discrimination in employment based on race, color, religion or national origin." (H.R. Rep. No. 914, 88th Cong., 1st Sess. (Title VII (1963)).

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[54] *See, e.g., Curtis* v. *Loether*, 415 U.S. 189, 197 (1974); *Head* v. *Timken Roller Bearing Co.*, 486 F. 2d 870, 876 (6th Cir. 1973) ("Congress evidently intended that the award of back pay should rest within the sound discretion of the trial judge"); *United States* v. *N. L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973) (discretionary denial of back pay upheld due to unsettled state of law in Circuit).

[55] *Hecht Co.* v. *Bowles*, 321 U.S. 321 (1944).

It is, therefore, an erroneous extension to assert that, "The clear purpose of Title VII is . . . to make whole, in a pecuniary fashion, those who have suffered by [all proscribed discriminatory practices]," *Bowe* v. *Colgate Palmolive Co.*, 416 F.2d 711, 720 (7th Cir. 1969). Clearly, Congress wished to end racial discrimination in employment. But the Congressional emphasis was on the prospective elimination of discriminatory practices and not on reparations. The hard-fought battle over remedies for a Title VII violation, including the substitution of the District Courts for the EEOC as the trial forum, and the substitution of *may* for *shall* in Section 706(g), indicate that Congress had no preconceived notions that compensatory damages in addition to injunctive relief would be appropriate "absent special circumstances." Rather, Congress wished to leave resolution of complex remedial problems to the traditional, discretionary powers of the federal courts of equity.[56]

The "special circumstances" rule adopted by the Court of Appeals for application to the back pay remedy derives from This Court's decision in *Newman* v. *Piggy Park Enterprises, Inc.*, 390 U.S. 400 (1968). *Newman* was an action under

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[56] In *Kober* v. *Westinghouse Electric Co.*, 480 F.2d 240 (3d Cir. 1973), the Court of Appeals for the Third Circuit recognized the vital role of the District Courts' discretion in formulating relief and expressly rejected the "special circumstances" rule adopted by the court below for that reason:

> "We must admit that these cases from the Fourth Circuit and Seventh Circuit severely limit the circumstances under which a trial judge may deny back pay. However, on this record we are inclined to follow the more persuasive reasoning of the Sixth Circuit in Manning v. General Motors Corp., supra, [466 F.2d 812] at 815-816; the Ninth Circuit in Schaeffer v. Yellow Cabs, Inc., supra, [462 F.2d 1002] at 1006-08; the Fifth Circuit in LeBlanc v. Southern Bell, supra, [460 F.2d 1228] and the dissenting opinion of Judge Boreman of the Fourth Circuit in Moody v. Albemarle, supra." (Footnote omitted). 480 F.2d at 247.

Title II of the Civil Rights Act of 1964, 42 U.S.C. §2000a-1 *et. seq.* in which This Court held that successful plaintiffs in such cases should ordinarily be awarded attorney fees absent special circumstances which would render such an award unjust. This Court reasoned that private litigants in Title II cases[57] act not for themselves alone, but as private attorneys general, vindicating a policy concerning public accommodations that Congress considered of highest priority. *Newman, supra,* at 402.

The recovery of back pay, being compensatory for past individual injury (see p. 66, *infra*), is vastly different from attorney fees for "private attorneys general" for advancing the commonweal. No compelling public purpose mandates an award of such private relief to Title VII plaintiffs.

2. The Discretion Of A District Court Regarding The Back Pay Remedy Should Be Guided By Traditional Equitable Principles.

The real difficulty with a "special circumstances" rule is that it deprives the trier of fact (who is most familiar with the ambiance of the case and the merits of each position) of an opportunity to formulate an award in the light of traditional equitable principles.

Complex equitable factors affect whether back pay is an appropriate remedy in a Title VII action. In *Georgia Power supra* at 922, for example, the Court held in relation to back

[57] The provisions for attorneys' fees under Title II and Title VII are virtually identical. *Compare* 42 U.S.C. §2000e-5(k) *with* 42 U.S.C. §2000a-3(b). Each was deemed by Congress as sufficiently significant to be expressed in an identical subsection of each Title. The authority for the grant or denial of back pay in Title VII is found among the general equitable remedies. 42 U.S.C. §2000e-5(g). Congress obviously intended separate treatment of attorneys' fees and back pay, affording the latter no greater presumption of appropriateness than its companion remedies.

pay, that equity demands that a true balance of interests be struck. The Court set forth a list of factors to be considered which, it cautioned, was illustrative and not exhaustive: (1) whether back wages are properly owing; (2) limitations and laches; (3) factors of economic reality; and (4) physical and fiscal limitations of the court to grant and supervise the relief. For other cases demonstrating complex equitable factors, see *Norman* v. *Missouri Pac. Ry. Co.,* (497 F.2d 596 (8th Cir. 1974), *cert. denied,* .... U.S. ...., 43 U.S.L.W. 3413 (U.S. Jan. 28, 1975); *United States* v. *St. Louis & S.F. Ry.,* 464 F.2d 301, 311 (8th Cir. 1972), *cert. denied;* 409 U.S. 1107 (1973); *Shaeffer* v. *San Diego Yellow Cabs, Inc.,* 462 F.2d 1002, 1006 (9th Cir. 1972); *Le Blanc* v. *Southern Bell Telephone and Telegraph Co.,* 460 F.2d 1228, 1229 (5th Cir.) *cert. denied,* 409 U.S. 990 (1972); *United States* v. *Dillon Supply Co.,* 429 F.2d 800, 804 (4th Cir. 1970); *Johnson* v. *Georgia Highway Express, Inc.,* 417 F.2d 1122, 1125 (5th Cir. 1969).

Two equitable factors present in this case were expressly cited by the District Court to support its denial of back pay. One was absence of bad faith non-compliance by Albemarle.

Albemarle submits that, while it may be argued that good faith in and of itself may not be sufficient cause for a denial of back pay, good faith is, at a minimum, a relevant factor which must be considered in balancing the equities to formulate an appropriate remedy.[58] A number of courts have so held in Title VII cases. See *Norman* v. *Missouri Pac. Ry. Co., supra; Kober* v. *Westinghouse Elec. Corp.,* 480

[58] The District Court's finding of Albemarle's good faith is amply supported on the record. Albemarle engaged in affirmative recruitment of blacks at an early point; Albemarle merged its Extra Boards and some lines of progression to enhance the opportunities of blacks; and, as judicial gloss was put upon Title VII, Albemarle took early steps to ensure its compliance. (See pp. 14-16 supra).

F.2d 240 (3rd Cir. 1973); *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973); *United States* v. *St. Louis & S.F. Ry., supra.* Those cases which have held that good faith is irrelevant or that it is an inadequate defense to a back pay claim[59] have apparently relied on This Court's observation in *Griggs, supra:*

> "We do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent; but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." 401 U.S. at 432.

It must be remembered that This Court in *Griggs* was speaking of good faith as a defense to a finding of a violation. Clearly a fundamental distinction exists between good faith as it relates to the continued maintenance of a discriminatory employment practice which must be eliminated to effectuate the purpose of the Act, and good faith as it relates to an award of money damages. Where the fundamental purpose of the Act--the prospective elimination of obstacles to equal employment opportunity—is in issue, This Court has properly found good faith irrelevant. Where the prospective elimination of discriminatory barriers to employment has been achieved and the issue is reduced to whether an employer should be forced, by an award of back pay, to pay again for work already performed and paid for, good faith is clearly a relevant consideration.

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[59] See e.g., *Waters* v. *Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974); *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 436 (5th Cir. 1974) *cert. denied*, ... U.S. ....., 43 U.S.L.W. 3306 (U.S. Nov. 26, 1974); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974); *Head* v. *Timken Roller Bearing Co.*, 486 F.2d 870 (6th Cir. 1973).

A second factor, of even greater importance in this case, is the conduct of the plaintiffs. Plaintiffs' complaint, filed August 25, 1966, sought only injunctive and other equitable relief. In response to Albemarle's Motion [to dismiss as a class action and] for Summary Judgment filed October 5, 1966, plaintiffs formally represented to the Court, "no money damages are sought for any member of the class not before the Court." (A. 13-14). Plaintiffs' purpose for disclaiming back pay was clearly to qualify their suit as a class action under Rule 23(b)(2), Federal Rules of Civil Procedure. It was not until four years had passed that Plaintiffs injected back pay claims into the case.[60] The long delay in adding the back pay claims satisfies all the elements of laches—a traditional equitable concern that the Court of Appeals found to be an insufficient "special circumstance."

Plaintiffs' disclaimer at the time of Albemarle's Motion for Summary Judgment created the justifiable conclusion that Plaintiffs were not pursuing their back pay claims. Furthermore, Plaintiffs clearly knew their rights under the Act, and their delay is not justifiable.

All defendants have been prejudiced by Plaintiffs' tardy assertion of a claim which Plaintiffs initially disavowed. Discovery relating to individual claims was clearly rendered much more difficult, if not impossible, by the passage of time.

Moreover, the parties have changed positions. Hoerner Waldorf Corporation, at the time an innocent third party, purchased Albemarle's assets in 1968 in the belief that in this suit plaintiffs were not seeking damages. Thus, the claim of laches is meritorious.

Plaintiffs should not be permitted to excuse their laches by resort to Rule 54(c) of the Federal Rules of Civil Proce-

[60] The first official indication that back pay would be in issue was in the District Court's Memorandum Opinion and Order entered September 29, 1970. (A. 37-38).

dure, relied on in *Robinson* v. *Lorillard*, 444 F.2d 791 (4th Cir. 1971), to uphold a discretionary grant of back pay despite the claim's tardy assertion. This is not merely a case of a tardy assertion of the claim. Plaintiffs at the outset *expressly* disavowed any intent to seek back pay. The substantial prejudice to Albemarle is amply demonstrated above.[41] The Fourth Circuit in *Robinson* cited with approval the following language from *Rental Development Corp. of America* v. *Lavery*, 304 F.2d 839, 842 (9th Cir. 1962):

> "If, however, it is made to appear that the failure to ask for particular relief substantially prejudiced the opposing party, Rule 54(c) does not sanction the granting of relief not prayed for in the pleadings."

Therefore, the substantial prejudice to Albemarle caused by plaintiffs' express disavowal of back pay claims mandated the District Court's denial of an award of back pay in this case.

The Court of Appeals' "special circumstances" rule, is at best a vague standard. District Courts are hardly better guided by "special circumstances" than by traditional equitable principles.

Moreover, the District Court was never granted the opportunity to apply the "special circumstances" rule to the facts of this case. Had it been granted such an opportunity, the District Court may well have articulated further factors present in this case in justification of its denial of back pay. Thus, the Court may have explicitly cited the speculative nature of back pay relief in Title VII cases[42], the unsettled

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[41] The District Court's finding of substantial prejudice (A. 498) to Albemarle cannot be said to be clearly erroneous.

[42] Since Title VII litigation is "rightful place" litigation, back pay awards must take into consideration, on an individual basis for each alleged discriminatee, (1) selection of the presumably appropriate

state of Title VII law during the pendency of this action[63], the absence of unjust enrichment to Albemarle[64], and the real failure of plaintiffs to make their case for back pay[65] as equitable factors which it considered in reaching its result.

Not only is a "special circumstances" rule in conflict with the plain language of the Act, it is inimical to the prompt elimination of "built-in headwinds" to equal employment opportunity. As a practical matter, a special circumstances rule will serve to inhibit voluntary conciliation of Title VII claims. Thus, if the granting of any form of injunctive relief will result in the virtually automatic triggering of back pay liability, every employer, however well intentioned, will, out of fear of back pay judgments, be compelled to oppose each item of requested injunctive relief, even if it be with respect to matters such as seniority which can benefit only employees— both black and white—and not the employer. Such employers will surely not, as Albemarle did, voluntarily consent to entry of injunctive relief of the type sought by plaintiffs.[66]

Finally, the Court of Appeals reversed the District Court's denial of back pay only after deciding that the factors cited

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"rightful place", (2) whether the employee would have achieved that employment status absent the violation, and (3) more typical inquiries such as interim earnings.

[63] See *United States* v. *N. L. Industries, Inc.*, 477 F.2d 354, 380 (8th Cir. 1973).

[64] See, e.g., *Porter* v. *Warner Holding Co.* 328 U.S. 395, 399-400 (1946) (Emergency Price Control Act); *Shultz* v. *Mistletoe Express Service Inc.*, 434 F.2d 1267, 1272 (10th Cir. 1970) (Fair Labor Standards Act).

[65] In this case the plaintiffs have failed to produce at trial particularized proof of their monetary claims, despite the direct indication by the District Court that claims for back pay would be considered at trial (See *supra*, pp. 19-20)

[66] See *supra* pp. 20-21.

by the District Court were individually insufficient to amount to special circumstances. Clearly the Court of Appeals erred in considering the District Court's reasons for denying back pay as isolated factors and not in their totality.[67]

Since the decision of the Court of Appeals, by adapting *Newman's* special circumstances rule to back pay claims effectively precludes the trial court from considering traditional equitable principles in deciding whether or not to award back pay, it should be reversed.

3. Even Under A "Special Circumstances" Standard, The District Court Was Justified In Denying Back Pay.

The factors cited by the District Court in denying back pay—Albemarle's good faith and Plaintiffs' tardiness in filing the claim—are of sufficient importance when taken together with the other factors mentioned above, to amount to special circumstances justifying the denial of back pay.

D. Back Pay Should Not Be Awarded To Class Members Who Did Not File Charges With The Equal Employment Opportunity Commission.

Upon the theory that back pay is merely a part of equitable relief, the Court of Appeals for the Fourth Circuit in *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971), followed below, permitted the recovery of back pay by all

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[67] See *Kober* v. *Westinghouse Electric Corp.*, 480 F.2d 240, 248 (3d. Cir. 1973):

> "The statute says that the court may order such affirmative action as may be appropriate, with or without back pay. It is our determination that this language clearly leaves the award or denial of back pay to the discretion of the district court *to be exercised in the light of all the circumstances of each case.*" (Emphasis added).

members of a Rule 23(b)(2) class in a Title VII action.[68] Without specifically considering the issue, the *Lorillard* decision confers on the courts by the device of nomenclature (i.e. "class action") jurisdiction to award individual monetary relief to persons who otherwise have no jurisdictional standing before the Court. The decisions of This Court are to the contrary. *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973); *Snyder* v. *Harris*, 394 U.S. 332 (1969).

It is one thing to bring a class action seeking prospective relief from policies or practices generally applicable to a class, such as a discriminatory seniority system, since the relief will apply to the class members, whether or not represented in the proceeding. It is quite another matter to bring an action for monetary relief on behalf of hundreds of individuals who may or may not have been actually damaged by application of broad practices to them.[69] Clearly back pay is redress for an individual wrong. Even the decision below in this case warned that back pay is limited to damages which are actually suffered. (A. 524)[70]

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[68] To the same effect: *Bowe* v. *Colgate Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969); *Franks* v. *Bowman Transportation Co.*, 495 F.2d 398 (5th Cir. 1974) *cert. denied* .... U.S. ...., 43 U.S.L.W. 3330 (U.S. Dec. 10, 1974); *Head* v. *Timken Roller Bearing Co.*, 486 F.2d 870 (6th Cir. 1973); and others.

[69] A critical factor ignored by the Court of Appeals is the very heavy burden of suit management that class-wide back pay cases would impose on District Courts. The speculative nature of the relief together with the individual proofs required would make even the administrative task of designating subclasses very difficult. The gathering, collating, and weighing of individual claims would be an even greater burden.

[70] See also *Johnson* v. *Goodyear Tire and Rubber Co.*, 491 F.2d 1364, 1375 (5th Cir. 1974):

> "There should be a separate determination on an individual basis as to who is entitled to recovery and the amount of such recovery."

The administrative complaint and conciliation procedures built into Title VII were an integral part of the legislative compromise which led to the enactment of the Civil Rights Act of 1964. Thereby the employer is given early notice of charges of discrimination filed against him, administrative investigation of such charges, and an opportunity to conciliate such charges as may have merit. Section 706(a), 42 U.S.C. §2000e-5(a). A court-made rule permitting class-wide back pay permits parties who have not filed a charge to circumvent this administrative process to the prejudice of employers. Not only are employers thus denied the protections provided by the statute, but are also denied timely notice of the nature and scope of the individual claims against them and the opportunity to prepare defenses to such individual claims.

Back pay claims are unique and personal to the individual. In a claim for injunctive relief, an employer who is unwilling to eliminate an allegedly discriminatory practice (such as job testing) in conciliation with one charging party, may reasonably be expected to adhere to the same position with respect to other individuals. By the same token, conciliation of injunctive matters with a single charging party is effectively conciliation with everyone similarly situated. In contrast, the fact that an employer is unable to reach agreement with one individual charging party regarding back pay does not preclude the possibility that such an agreement could be reached on other individual back pay claims. The eligibility of an individual for back pay turns upon the specific circumstances applicable to that individual. Thus, the success or failure of conciliation of one back pay claim turns on factors unique to the individual, and the filing and conciliation of charges by other individuals claiming back pay does not involve duplication of effort.

Judge Robert R. Merhige in *Austin* v. *Reynolds Metals Co.*, 327 F. Supp. 1145 (E.D. Va. 1970), summed it up succinctly:

> "The right to individual compensation, while an element of federal policy incorporated in the act, 42 U.S.C. §2000e-5(g), is not so important as injunctive relief from a policy injurious to the public as a whole. Individuals can consistently be required to prosecute administrative charges at their own initiative in order to be eligible for damages. Possibly the court in Antonopulos [v. Aerojet-General Corp., 295 F.Supp. 1390 (E.D. Cal. 1968)] believed that the charging party intended her submission to be a joint claim and honored it as such, or that at any rate the administrative agency had behaved accordingly. But to allow any individual to recover damages for a practice of which he has not complained administratively would frustrate the Commission's role in a manner which has been consistently disapproved. Johnson v. Seaboard Air Line Railroad Co., 405 F.2d 645, 1 FEP Cases 456, 69 LRRM 2916 (4th Cir. 1967). The Commission's conciliation efforts amount essentially to negotiations over a settlement satisfactory to all concerned and consistent with the Act. Success is not always complete, as this case shows. But there will be no genuine opportunity to conciliate if all of the aggrieved individuals are not before the Commission and the magnitude of their claims is not apparent. Therefore this Court holds that although non-charging parties may intervene on the issue of injunctive relief, they may not now sue for damages."

Thus, while there may exist a common question of law in Title VII cases, that is the only relation between the members of the class, and their back pay claims are no more than claims for individual redress, involving separate issues and sometimes conflicts of interests. Among the individual issues involved in computing whether damages warranting back

pay are actually suffered are: whether the individual was otherwise qualified by, for example, his experience, employment history and background, for the job or jobs in question; whether he actually applied for the job in question or would have applied absent a violation of the Act; whether, at the time of application a vacancy in the job existed; the pay rates of the individual and those of various jobs in question; and individual matters relating to mitigation (including interim earnings, see §706(g), 42 U.S.C. §2000e-5(g)).

There is no question that in order to have standing to bring an action under Title VII, an individual must have filed timely charges of discrimination with the EEOC. This is a jurisdictional requirement. *McDonnell Douglas Corp., supra* at 798; *Dent* v. *St. Louis & S.F. Ry. Co.*, 406 F.2d 399 (5th Cir. 1969); *Stebbins* v. *Nationwide Mutual Ins. Co.*, 382 F.2d 267 (4th Cir.), *cert. denied*, 390 U.S. 910 (1968); *Richardson* v. *Miller*, 446 F.2d 1247 (3d Cir. 1971); *Griffin* v. *Pacific Maritime Ass'n.*, 478 F.2d 1118 (9th Cir.), *cert. denied*, 414 U.S. 859 (1973); *Cox* v. *United States Gypsum Co.*, 284 F. Supp. 74, 76 (N.D. Ind. 1968), *aff'd*, 409 F.2d 289 (7th Cir. 1969).

In *Stebbins* v. *Nationwide Mutual Insurance Co.*, 382 F.2d at 268, (4th Cir. 1967) the Court held:

> "Having reviewed the legislative history of the Act, as well as its language, we agree with the District Judge that the Plaintiff could not bypass the federal agency and apply directly to the courts for relief. Congress established comprehensive and detailed procedures to afford the EEOC the opportunity to attempt by administrative action to conciliate and mediate unlawful employment practices with a view to obtaining voluntary compliance. The plaintiff must therefore seek his administrative remedies before instituting Court action against the alleged discriminator."

Therefore, the filing of a charge is jurisdictional and serves a very important purpose. In *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973), This Court upheld the refusal of a District Court to permit a case to proceed as a class action because the unnamed plaintiffs, having separate and distinct claims, did not individually satisfy the jurisdictional amount requirement. While *Zahn* involved jurisdictional amount, the principle is applicable here.

The decisions are unanimous that the jurisdiction of the Federal Courts is not available for the individual discrimination claims of persons who have not filed charges with the EEOC; and Rule 23 cannot be manipulated to confer jurisdiction where it does not otherwise exist. *Zahn, supra.*

The Federal Rules themselves prohibit the use of the class action device to circumvent statutory jurisdictional requirements. *Snyder* v. *Harris*, 394 U.S. 332, 337 (1969). Rule 82 provides explicitly that:

> "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."

Quite apart from jurisdictional amounts therefore, Rule 82 prevents the manipulation of Rule 23 to bypass *any* jurisdictional requirements. *Weiner* v. *Bank of King of Prussia*, 358 F. Supp. 684, 694-96 (E.D. Pa. 1973); *Sperberg* v. *Firestone Tire and Rubber Co.*, 61 F.R.D. 70, 73-74 (N.D. Ohio, 1973).

Therefore, back pay, if any is held appropriate in this case, should be limited to the named plaintiffs.

VIII.

CONCLUSION

1. Affirm The District Court

After hearing eight days of evidence and having travelled to Roanoke Rapids and viewed the mill, the District Judge concluded that Albemarle's tests were job related and declined to enjoin their use. He did, however, enjoin the use of a high school education requirement and prescribed a seniority system based on "mill seniority" and a system for the non-discriminatory use of the Extra Board (or pool). In his discretion, the District Judge denied back pay. It is apparent from the record and from his findings of facts and conclusions of law, that the District Judge had diligently familiarized himself with all the ramifications of the case.

Albemarle submits that the District Judge was correct not only on the facts but also on the law. His order should be affirmed and after nearly nine years this litigation should be brought to an end. For those reasons, Albemarle requests This Court to reverse the Court of Appeals and affirm the judgment of the District Court.

2. Reverse The Court Of Appeals And Remand To The District Court For Further Proceedings

Even if the panel of the Court of Appeals were correct on the law, its decision still should be reversed by This Court and the case remanded to the District Court for further proceedings. The remand could conceivably be on a variety of issues depending upon This Court's views on the broad testing and back pay issues. Thus, Albemarle's secondary request for relief is that to the extent the District Court's de-

cision is not upheld that the case be remanded to the District Court for further proceedings.

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No. 74-389

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

ALBEMARLE PAPER COMPANY, ET AL., *Petitioners,*

v.

JOSEPH P. MOODY, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF SCOTT PAPER COMPANY AS AMICUS CURIAE

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BRIEF OF SCOTT PAPER COMPANY AS AMICUS CURIAE

This brief of Scott Paper Company as *amicus curiae* is filed with the written consents of the parties, which have been filed with the Clerk. Rule 42(2).

THE INTEREST OF SCOTT PAPER COMPANY AS AMICUS CURIAE IN THIS PROCEEDING

Scott's interest in this case stems from the fact that some issues involved here concerning standardized employment tests are also involved, although on markedly

different facts, in a case against Scott, now pending in the Court of Appeals for the Fifth Circuit, under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*, *Watkins* v. *Scott Paper Co.*, 5th Cir., No. 74-1001.[1]

Scott is a substantial producer of pulp and paper at a number of mills located in various parts of the country. The *Watkins* case challenges various employee promotion practices employed at Scott's first mill in the South, located in Mobile, Alabama. The Mobile mill, built in 1940, was acquired by Scott in 1954. It had been manned in accordance with the traditional Southern practice of limiting blacks to lower paying, more menial jobs.

In late 1961, Scott announced that no job would be barred to any employee or applicant because of race. By 1968, over 300 of Scott's 500 black employees were in jobs historically reserved to whites. Scott's desegregation efforts led the Director of the Industrial Research Unit at the University of Pennsylvania to cite Scott in 1969 "as a leader in minority integration in the [paper] industry" and as having "justly acquired the reputation as *the* place to apply for work in the Negro community." Northrup, THE NEGRO IN THE PAPER INDUSTRY (1969), pp. 110, 111 (emphasis is Professor Northrup's).

In 1958, Scott was planning to open a new Tissue Mill in Mobile. This mill would double the work force and would also introduce machinery that was more ad-

[1] The facts stated herein are all contained in the record developed at trial, 6 EPD ¶ 8912 (S.D. Ala. August 27, 1973), on file in the Court of Appeals for the Fifth Circuit. Counsel for plaintiffs in *Watkins* include the same New York counsel who represent respondents here.

vanced, faster operating and more highly automated than the printing grade paper machines in use at the old mill. In manning a new Tissue Mill in Everett, Washington, a few years earlier, Scott had found that requiring all job applicants to take the Kopas test (and have a high school diploma or its equivalent) increased the likelihood that new employees could, after extensive and costly on-the-job training, learn to operate the new, complex, fast-moving machinery. Scott's Personnel Director at Mobile in 1958 had been at Everett at the earlier time, and when the new Mobile mill opened in 1958, the Kopas (and high school) requirement was instituted, though initially only for white applicants.

When Scott changed the historic racial practices it had inherited so that blacks were expected to move into all jobs, Scott began requiring blacks to meet the same requirements for hiring and promotion previously required only of whites.

The testing and educational requirements have also been utilized since 1958 to select among applicants for "helper" jobs in the Maintenance Department. Helpers progress almost inevitably to qualification as journeymen in particular crafts in two or more years. Although helpers' wage rates are at the same level as entry level production jobs, Maintenance jobs are much sought after, and the successful applicant usually has accumulated between seven and ten years of seniority in a production department.

Some years after Scott began using the Kopas test, psychologists began to consider the possible racially discriminatory impact of many commonly used employment tests. See, *e.g.*, Educational Testing Service, "An Investigation of Sources of Bias in the Prediction of Job Performance, *A Six Year Study*" (June 22,

1972), at p. 3.[2] As a result, the Office of Federal Contract Compliance (OFCC)[3] questioned the validity of the Kopas test. OFCC recommended that Scott use the Wonderlic test instead. OFCC advised that Wonderlic had been validated at International Paper Company's Mobile mill, right next to Scott's. Scott therefore dropped Kopas in favor of Wonderlic on July 1, 1968.

At the same time, Scott retained Dr. William E. Scott, Jr. (no relation), a qualified industrial psychologist with considerable knowledge of the paper industry. Dr. Scott was not to attempt validation of Wonderlic but to design a new testing program which would validly predict successful job performance at Scott.

Dr. Scott began by spending one week in a Scott mill closely observing worker performance to define the aptitudes required for the job. He then compared these perceived aptitudes and his previously acquired knowledge of the industry with data about available tests. On this basis Dr. Scott selected eight standardized tests and performed concurrent validation studies on these tests at Scott mills in Mobile and Detroit. As to four of the tests, evidence of validity was not strong and they were discarded. Dr. Scott determined that the other four—Bennett Mechanical, Purdue Non-Language, Perceptual Speed, and Closure Flexibility—had a significant relationship to job performance. He recommended that Scott use these tests to screen applicants for hiring in production departments and that it use the first three of the tests to screen applicants for Maintenance jobs.

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[2] This study concluded that the concept of "differential validity" was not supported by the data examined in the study, *id.* at 16.

[3] OFCC is the agency within the Department of Labor which has been given primary responsibility to oversee and enforce compliance with various Executive Orders relating to equal employment opportunity policies of government contractors.

Rather than relying solely upon his concurrent validation study, Dr. Scott recommended that relatively low cutoff scores be used for hiring into production jobs (slightly higher scores were recommended for Maintenance) in order to gather data for a predictive validation study.[4] The Company accepted Dr. Scott's recommendations (although it set the cutoff scores at even lower levels than those recommended by Dr. Scott), and data are now being analyzed for the predictive study.

These decisions were made in the late Summer and early Fall of 1970, and the new test battery was instituted in November of that year. On August 1, 1970, the Equal Employment Opportunity Commission (EEOC), which had prepared guidelines on testing in 1966, published a substantially different and expanded set of guidelines on testing in the Federal Register. 35 Fed. Reg. 12333.

Scott's hiring since the adoption of the new test battery includes approximately 40 percent blacks, whereas the available labor force contains 27.9 percent blacks.

After trial, the District Court in *Watkins* found the evidence insufficient to conclude that Scott's test battery, used as a Maintenance screening device, had a disproportionate racial impact.[5] The Court also found

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[4] A predictive validation study involves giving the test to job applicants but not using the scores as a screening device, and thereafter comparing the scores with job performance of those who have been hired. A concurrent validation study involves giving the test to present employees and then studying the comparison between the test scores and their performance on the job. 29 C.F.R. § 1607.5.

[5] Only seven blacks had taken the test battery for Maintenance, and the Court found this number too small to have statistical significance. *Cf.* Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Service Comm'n, 482 F.2d 1333, 1338-39 (2d Cir. 1973).

that Scott had carried its burden of establishing that the tests were valid predictors of successful performance in Maintenance jobs.[6]

ARGUMENT

As this summary shows, Scott's *Watkins* case involved a number of points that this Court may consider in deciding this case, although on a different factual record.

First, neither this case nor *Watkins* involves the hasty implementation of a testing program effective contemporaneously with Title VII (as was the case in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971)). Scott shares with other employers a strong interest in the sound development of programs which will improve their employee selection procedures. Employers have a strong business purpose in utilizing only those tests which "pass" potentially good workers and "screen out" potentially poor workers. Tests and other sound tools of employee selection substitute objective criteria for subjective or irrational criteria (including race), and thus serve the interests of both employer and minority employee. See EEOC Guidelines, Section 1607.1 (a). Thus, testing is by no means a suspect practice under Title VII. See *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 434 & nn. 10 & 11.

Second, both this case and *Watkins* involve the question whether compliance with every detail of the EEOC Guidelines is indispensable to finding that an employ-

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[6] The use of the tests to screen job applicants was not at issue in the trial because the plaintiff class did not include unsuccessful job applicants.

The District Court also found the high school requirement lawful, a finding not challenged by the plaintiffs on appeal.

er's validation study complies with Title VII. Thus, both cases raise issues about the reasonableness of the Guidelines and whether a requirement of strict compliance will, by imposing costly and artificial burdens, drive employers away from using tests, even if professionally developed and validated.[7]

For these reasons, Scott urges that this Court, in passing upon the contentions of the parties in this case, give consideration to the following points.

1. Failure of a Validation Study to Comply with Procedural Requirements of EEOC Guidelines Published After The Study Should Not Cause Rejection of The Study.

The EEOC Guidelines are unquestionably entitled to respect. See *Griggs* v. *Duke Power Co., supra.* On the other hand, the law is what Congress has written, and failure to follow the Guidelines in every particular should not render a validation study unacceptable. *Cf. Espinoza* v. *Farah Mfg. Co.,* 414 U.S. 86 (1973).

This must especially be true where the study was conducted before the Guidelines were published and where the discrepancy relates only to procedural, as distinguished from substantative, requirements of the Guidelines.[8] Any other result would automatically invalidate every study conducted before August 1, 1970, (and

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[7] For explorations of this problem, see Wilson, *A Second Look at Griggs* v. *Duke Power Company; Ruminations on Job Testing, Discrimination and the Role of the Federal Courts,* 58 U. VA. L. REV. 844, 873 (1972); Winter, *Improving the Economic Status of Negroes Through Laws Against Discrimination; A Reply to Professor Sovern,* 34 U. CHI. L. REV. 817, 831-835 (1967).

[8] See Kinsey v. Legg, Mason & Co., Inc., 8 EPD ¶ 9767, at p. 6207 & n.4 (D.D.C. November 11, 1974).

thus long before *Griggs*) except those which fortuitously complied with procedural rules that were unknown and that could not reasonably be foreseen.[9] For example, the Guidelines (§ 1607.6) require that the *report* of a validation study contain certain elements that professional standards apparently do not require.[10] Certainly, a report to a client which satisfies professional standards, especially if it was made before issuance of the Guidelines, should not be rejected because it lacks non-substantive elements the Guidelines now require.[11]

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[9] It may be presumed that a substantial number of other companies like Scott had already conducted validation studies before the 1970 EEOC Guidelines were published.

[10] We note that the American Psychological Association's recently published *Standards for Educational Tests* (1974) states that *manuals* prepared for test users "should describe the duties of the workers as well as give their job titles." Point E3.1., at 33. The *Standards* label such description as "very desirable" (rather than "essential") but they do not appear to call for any similar requirement of written job analyses for an actual validation study. Requirements for manuals for test users are obviously different from requirements imposed on a testing expert actually conducting a validation study, and the omission of a requirement in the second case is therefore of significance here.

[11] Some requirements in the Guidelines may fall somewhere between the substantive and the procedural. Failure of a validation study (especially if performed before the Guidelines were published) to comply with such "grey area" requirements may pose a more serious problem. If the study is otherwise sound, the better course may be to permit the employer to continue utilizing the test subject to prompt correction of the deficiency. This is the approach followed in the Fifth Circuit when an employer learns that its validation study should have complied with a principle announced for the first time on appeal. *United States* v. *Georgia Power Co.*, 474 F.2d 906, 917-18 (5th Cir. 1973).

2. The Absence of Written Job Analyses Should Not Necessarily Cause Rejection of a Validation Study.

Job analyses apparently serve three purposes in a validation study. Where those purposes are well served by other means, the absence of job analyses is not a substantive deficiency. Moreover, where job analyses *have* been performed but have not been reduced to writing, the study should not be rejected.

The first purpose of job analyses is to assist in the initial selection of tests to be validated. This purpose might be equally served, however, by having the testing expert carefully study the jobs and reach conclusions about the criteria for successful job performance (*e.g.*, observing a fast-moving line of finished products and quickly spotting those which are too large, off-color, etc.), thus obviating the use of job analyses. See C. Lawshe and M. Balma, PRINCIPLES OF PERSONNEL TESTING, at p. 23 (2d ed. 1966). If the expert chooses his tests incorrectly, the result is only a validation study that fails to show correlations between test scores and job performance; if the study does show the appropriate correlation, it is immaterial whether the tests were actually selected on the basis of job analyses. Thus, the absence of written job analyses has no Title VII impact.

The second purpose of job analyses in a concurrent validation study is to provide a basis for objectivity in rating worker performance so that comparisons of performance and test scores may be made. The ratings must distinguish the better performers from the less adequate performers. If the rater does not know how to measure performance levels, the comparisons will not accomplish their purpose. Alternate techniques, however, are commonly employed. One is the paired

comparison technique. Supervisors (who of course already have responsibility for assessing job performance) rate each worker *against each other worker,* and the results are processed by means of statistical techniques to produce ordinal rankings of all the workers.[12] Under such a procedure, the development of formal, written job analyses would not affect the rankings.[13]

The third purpose of job analyses is in comparing two jobs to determine whether they involve similar criteria. For example, there may be too few workers in a particular job to permit a validation study of that job, but if it employs criteria similar to those in a job for which a test has been properly validated, it may be permissible to utilize that test to screen applicants for both jobs.[14] But here again, written job analyses are not the only way to accomplish this comparison. The testing expert, for example, may have made job

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[12] If the worker group contains blacks and whites and a biased supervisor consistently rated blacks below whites, the statistical methods employed for examination of the data would cause this bias to be detected, and hence that supervisor's ratings would not be utilized. C. Lawshe and M. Balma, *op. cit. supra,* pp. 48-49.

[13] A court of appeals has reached a different conclusion. Rogers v. International Paper Co., 9 EPD ¶ 9865 (8th Cir. January 7, 1975).

[14] This issue is present in Scott's *Watkins* case. The validation study conducted by Dr. Scott in 1969 included giving the tests to 119 Maintenance journeymen in six different crafts at Scott's Mobile and Detroit mills. The test could not be validated against certain other craft jobs because there were too few incumbents willing to participate in the validation study. Dr. Scott had studied all of these craft jobs, however, and he concluded that the criteria being measured were applicable to all of the Maintenance craft jobs. Accordingly, he recommended that the same test battery be used to screen applicants for all of the jobs.

analyses but not reduced them to writing; or he may be familiar with the two jobs and able, without preparing written job analyses, to reach a professionally sound conclusion that no significant differences exist between them. In such a case, the absence of written analyses should not bar acceptance of the expert's conclusions.

And, as stated under Argument 1, *supra,* where the formal Guideline requirement of *written* job analyses was issued after the validation study was conducted, absence of written analyses provides even less of a basis for rejecting the study.

CONCLUSION

Scott respectfully urges the Court to consider the arguments made herein in its resolution of the issues in this case which involve validation of standardized employment tests.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

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ALBEMARLE PAPER COMPANY, ET AL.,
Petitioners,

v.

JOSEPH P. MOODY, ET AL.,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF THE AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION, AS AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-389, 74-428

ALBEMARLE PAPER COMPANY, ET AL.,
Petitioners,

v.

JOSEPH P. MOODY, ET AL.,
Respondents.

MOTION OF THE AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Society for Personnel Administration (ASPA) hereby moves this Honorable Court, pursuant to Supreme Court Rule 42(3), for leave to file a brief as amicus curiae in this case. ASPA is the nation's largest human resources management association, representing almost 15,000 personnel and industrial relations executives working in business, government and education. ASPA is dedicated to the advancement of personnel and industrial relations management in the United States and in twenty-six foreign countries. ASPA is, of course, vitally interested in the procedures used to choose qualified applicants for employment, and has maintained a close involvement in the development of federal

standards which seek to assure nondiscrimination in these procedures. For example, on August 23, 1973, the Equal Employment Opportunity Coordinating Council (EEOCC)[1] issued draft "Proposed Uniform Guidelines on Employee Selection" which, in the view of many, including personnel administrators and industrial psychologists, was unworkable and technically unsound. ASPA, together with other public and private groups, sought to articulate the various concerns, and to offer constructive alternative approaches whenever possible.

As set forth more fully in pages 1 to 4 of the attached amicus brief, ASPA believes that properly developed and utilized employment tests serve both the purposes of efficient personnel selection and the objectives of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* ASPA is concerned that administrative and judicial interpretations of this Court's decision in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), which have required test validation in strict conformity with the Equal Employment Opportunity Commission (EEOC) Guidelines on Employee Selection Procedures, 29 CFR § 1607 *et seq.* (1970), will deter employers from using objective tests. Rather than face unnecessarily stringent validation requirements, employers may turn to more subjective procedures, or to some form of quota-based system. Either result would subordinate the selection of employees on the basis of qualifications, which this Court recognized as "the very purpose of Title VII. . . ." 401 U.S. at 434.

It is because of these concerns that ASPA seeks to submit the attached amicus brief for the Court's con-

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[1] EEOCC was established by the 1972 Amendments to Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e *et seq.*), P.L. 92-261, 86 Stat. 103, in order to coordinate federal policy on employment discrimination. *See* 118 Cong. Rec. S. 577 (daily ed., Jan. 26, 1972).

sideration. It was prepared on behalf of ASPA by a technical subcommittee of industrial psychologists and represents the views of these practicing professionals. ASPA hopes that its experience in personnel administration and with the development of federal testing guidelines, as well as the expertise of its subcommittee, will be of assistance to the Court in its resolution of the present case.

The views expressed in the brief are intended to assist the Court by providing a clear and concise summary of recent developments in the area of validation of professionally developed tests and other objective employee selection techniques. ASPA takes no position on the issue of back pay, or any other issue unrelated to testing and employee selection which may be considered in this case. Although ASPA recognizes that its views may reflect on the positions of the parties, it neither endorses nor challenges the argument of either party and expresses no opinion as to the ultimate resolution of the merits of this case.

For these reasons, the American Society for Personnel Administration respectfully requests leave to file a brief as amicus curiae in the present case.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 74-389, 74-428

ALBEMARLE PAPER COMPANY, ET AL.,
Petitioners,

v.

JOSEPH P. MOODY, ET AL.,
Respondents.

BRIEF OF THE AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION, AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The interest of the American Society for Personnel Administration (hereinafter "ASPA") is set forth in the foregoing Motion to File a Brief as Amicus Curiae.

INTRODUCTION AND SUMMARY OF ARGUMENT

As noted above,[1] ASPA's request to participate in this case is based on its concern regarding the administrative and judicial interpretations being given to this Court's decision in *Griggs* v. *Duke Power Company*, 401 U.S.

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[1] *See* Motion for Leave to File a Brief as Amicus Curiae, at pp. II-III.

424 (1971). Specifically, a number of courts have construed the Equal Employment Opportunity Commission (EEOC) Guidelines on Employee Selection Procedures, 29 CFR § 1607 *et seq.* (1970), as rigid procedures which must be complied with in every validation study, if the study is to be viewed as an adequate demonstration that a test is "job-related" within the meaning of *Griggs*. As the requirements for complex, expensive and time-consuming validation research for tests[2] increase—requirements which even expert industrial psychologists may not be able to satisfy—many employers confront mounting pressures to abandon the use of professionally developed tests and other objective employee selection mechanisms and resort to quota-oriented or other arbitrary hiring systems.

This result would be inconsistent not only with the efficient selection of qualified employees, but also with the spirit of Title VII,[3] which, as this Court recognized in *Griggs*, requires the selection of employees on the basis of qualifications:

> Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality and sex become irrelevant. 401 U.S. at 436.

ASPA believes that properly developed and utilized tests are the best means of implementing this basic pur-

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[2] Throughout this brief, the term "test" will be used to refer to professionally developed ability tests, rather than the omnibus definition of the term "test" contained in the EEOC Guidelines, which would seem to include selection mechanisms such as seniority, medical examinations, training, reference checks, and prior experience. However, the Court's resolution of the present case, unless qualified, may well be construed as applying to all such selection mechanisms.

[3] Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*

pose in many employment contexts. Tests and other objective selection devices are the very heart of a workable merit opportunity system in which qualifications are the paramount factor in hiring and promotion. Even where objective tests have been validated [4] under less than ideal circumstances, they are far superior to the more widely used selection devices such as unstructured interviews or job application reviews. Tests provide three distinct advantages over less disciplined alternatives: they are *standardized* (*i.e.*, every examinee is given the same instructions, the same tasks to do, and the same time limits), they are *efficient* (*i.e.*, they allow a considerable amount of information about a person to be collected in a short period of time), and they are *amenable to objective analysis* (*i.e.*, tests results may be quantified and subjected to statistical evaluation).

While ASPA strongly endorses the value of tests as vehicles for the advancement of equal employment opportunity, it recognizes that there must be some mechanism for reviewing the use of a test in order to assure consistency with the objectives of Title VII. ASPA also recognizes that guidelines and regulations must be promulgated by the enforcing agencies to promote enlightened and uniform interpretation of the law. In the area of testing and test validation, which is highly complex, there is a particularly urgent need for such an interpretation of the Act, but this uniformity must not be allowed to become so rigid as to restrict the flexibility and adaptability necessary to the test validation process. Testing guidelines must be recognized as theoretical or ideal models which cannot always be fol-

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[4] In the context of employment testing, "validity" and "job-relatedness" are synonymous. For a test to be considered valid, it must support the inference that those who score higher are likely to perform the job in question better than those who score lower; *i.e.*, that test performance is related to job performance.

lowed in practice.[5] If they are applied as a rigid checklist, as several courts have applied the existing Guidelines, validation studies[6] will be rendered impractical and the use of valid tests will be discouraged. Given this situation, this Court's guidance is essential in order to establish the framework in which the adequacy of test validation efforts is to be measured by reviewing courts and agencies.

This brief seeks to highlight certain interpretations of *Griggs* which have produced unworkable or unnecessary requirements for test validation. It then points out some of the practical limitations on test validation which should be borne in mind when considering the adequacy of any validation study, and suggests broad principles which may be applied by reviewing courts in assuring that employment tests are "job-related" without creating pressure for the abandonment of valid tests.

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[5] The conduct of a validation study, simply stated, is the process of investigation and research aimed at determining whether or not the use of a test validly accomplishes that which it is intended to do.

[6] Even the exhaustive "Standards for Educational and Psychological Tests," published by the American Psychological Association, Washington, D.C. (1974 ed.) [hereinafter "APA Standards (1974)"], caution that:

> "Manuals can never give all the information, and test users can never follow all the procedures that might be desirable. . .
>
> ". . . Any test or testing situation may present some unique problems; it is undesirable for the standards to be treated as unduly rigid. . . . The Essential standards indicate what information or practices will be needed for most tests in most applications. When a test developer or test user fails to satisfy these requirements, he should do so only as a considered judgment. In any single test or testing situation, there may be some Essential standards that do not apply. *Id.* at 6.

The 1974 APA Standards replaced the APA's "Standards For Educational and Psychological Tests and Manuals" (1966).

ARGUMENT

I. This Case Will Call Upon the Court to Amplify Its Decision in *Griggs* v. *Duke Power Company*

A. *The Griggs Decision*

In its landmark decision in *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971), this Court for the first time considered the effect of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* on the use of professionally developed ability tests to select employees. Duke Power Company had utilized two professionally developed tests [7] to select new employees, but it apparently never argued that the tests were "directed or intended to measure the ability to learn to perform a particular job or category of jobs." *See* 401 U.S. at 428. Rather than being adopted on the basis of a "meaningful study of their relationship to job performance ability," the testing requirements "were instituted on the Company's judgment that they generally would improve the overall quality of the work force." *See* 401 U.S. at 431.

The Court did not challenge the finding below that the employer had acted in good faith, but concluded that:

> [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability. 401 U.S. at 432.

Moreover, the Court declared that, contrary to assertions of the employer, Section 703(h) of the Act [8] did not

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[7] Specifically, the tests involved in *Griggs* were the Wonderlic Personnel Test and the Bennett Mechanical Comprehension Test.

[8] This section of the Act provides:

> Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer

[Footnote continued on page6]

represent a congressional *carte blanche* to use any professionally developed ability test regardless of its impact on groups protected under the Act, but authorized only job-related tests.

Because the court of appeals had found no requirement in Title VII that employment tests be job-related, the Court went into some detail in its analysis of this issue, including reference to the legislative history of the Act. It noted that while ". . . the very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color," [9] Congress did not intend to "permit an employer to give any test, 'whether it was a good test or not, so long as it was professionally designed'." [10] Based on this analysis, the Court concluded that:

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[8] [Continued]

> . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin. 78 Stat. 255, 42 U.S.C. § 2000e-2.

[9] 401 U.S. at 434, *quoting* 110 Cong. Rec. 7247.

[10] *Id.* at 435, *quoting* 110 Cong. Rec. 13504. As further support for its determination that Section 703(h) authorized the use of only such tests as are demonstrably job-related, the Court noted that:

> The Equal Employment Opportunity Commission, having enforcement responsibility, has issued guidelines interpreting § 703(h) to permit only the use of job-related tests [footnote omitted]. The administrative interpretation of the Act by the enforcing agency is entitled to great deference [citations omitted]. *Since the Act and its legislative history support the Commission's construction,* . . . this affords good reason to treat the guidelines as expressing the will of Congress." 401 U.S. at 433-34 (emphasis added).

The Court also noted in footnote 9 that:

> The EEOC position has been elaborated in the new Guidelines on Employee Selection Procedures, 29 CFR § 1607, 35 Fed. Reg. 12333 (Aug. 1, 1970).

> Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force *unless they are demonstrably a reasonable measure of job performance.* Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. *Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor,* so that race, religion, nationality, and sex become irrelevant. *What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.* 401 U.S. at 436 (emphasis added).

B. *Developments Since Griggs*

Since the *Griggs* decision was issued in March of 1971, several courts of appeal have addressed the question of how professionally developed employment tests may be shown to be "job-related," and therefore permitted by Section 703(h).[11] *Moody* v. *Albemarle Paper Company,* 474 F.2d 134 (4th Cir. 1973), reflects the Fourth Circuit's application of the principles enunciated in *Griggs.*

The decision below in this case and decisions of certain other courts of appeal have created substantial concern among ASPA members and others that employment testing is being jeopardized by unnecessary and unrealistic burdens of proof. This concern was anticipated several years ago in a Development Note in the Harvard Law Review:

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[11] *See, e.g.,* United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971); United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973); and Rogers v. International Paper Company, —— F.2d ——, 9 CCII Empl. Prac. Dec. ¶ 9865 (8th Cir. 1975).

> Courts are rightly suspicious when there is evidence that the application of hiring or promotional standards has a substantial differential impact on minority employment opportunities. In such cases they should require a substantial showing by the employer that his tests are useful in predicting ability to do the job. . . . At the same time, courts should be cautious lest they require such a high degree of proof from the employer that standards which very probably are valid must be abandoned because of the impracticality of demonstrating validity.[12]

The essence of this growing concern arises from the overly rigid and literal interpretations being given to the EEOC Guidelines on Employee Selection Procedures: courts are applying the Guidelines as strict procedural requirements in situations where the Guidelines are simply inappropriate. The net result of these increasingly rigid technical requirements has been an erosion, in some instances approaching a total elimination of the professional judgment and flexibility that the process of test validation requires. For example, there has been an insistence that detailed job analyses be performed to make evaluation of job performance more "objective," and that differential validation studies be made feasible and be conducted.

ASPA also is concerned that some testing programs have been denounced on the basis of evidence that certain individuals have performed satisfactorily on the job without attaining prescribed minimum scores, despite the fact that such instances are inherent in *any* process which involves the application of probability theory, as objective employee selection techniques do.[13]

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[12] Note, Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1166 (1971).

[13] *See* Hays, W. L., STATISTICS FOR PSYCHOLOGISTS, New York: Holt, Rinehart & Winston (1963), Chapters 2 and 3.

The present case illustrates these concerns. It represents the first decision of the Fourth Circuit on the adequacy of an employer's validation efforts. In this case, the employer, Albemarle Paper Company, attempted to comply with the *Griggs* decision by retaining an industrial psychologist to determine whether the Company's existing testing program was sufficiently related to job performance. Using a concurrent validation technique,[14] the psychologist conducted a validation study, and concluded that the tests used by the employer were valid and that they could reasonably be used to assist the employer in selecting the employees best suited for the available jobs.

After reviewing the research conducted on behalf of the employer, the court of appeals relied upon the EEOC Guidelines in holding that:

> We think Albemarle has failed in several respects to show that its tests are job related, have a manifest relationship to employment, *and have been validated in accordance with EEOC Guidelines.* 474 F. 2d at 139 (emphasis added).

The first failure cited by the court was the absence of "some form of job analysis resulting in specific and objective criteria for supervisory ratings" of job performance. *Id.* at 139. In the Court's view "[t]o require less is to leave the job-relatedness requirement largely to the good faith of the employer and his supervisors." *Id.*

This position has recently been extended by the Eighth Circuit in *Rogers* v. *International Paper Company,* 9 CCH Empl. Prac. Dec. ¶ 9865 (8th Cir., January 7,

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[14] Concurrent validation is a professionally recognized validation technique which involves the simultaneous collection of test scores and job performance data on samples of current employees, and the comparison (correlation) of these two sets of scores.

1975). In *Rogers*, the court of appeals stated that "where objective criteria are employed, the EEOC Guidelines . . . *control.*" (emphasis added).[15] Applying the EEOC Guidelines, the Eighth Circuit concluded that the employer had not performed adequate job analyses as required by Section 1607.5(b)(3),[16] and found the absence of "proper and careful job analyses" to be "fatal to the validation study." *Moody* v. *Albemarle Paper Co.* was cited in support of that conclusion.[17]

The Eighth Circuit also found that the employer had been deficient under the EEOC Guidelines in failing to conduct a differential validation study for black maintenance craft employees, or at least to prove that such a study was not technically feasible. The court concluded that the

> [A]bsence of differential validation and the . . . [absence of blacks] in the sample composition . . . render the study inadequate. See also *United States* v. *Georgia Power Co.*, *supra*, 474 F.2d at 914; *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418, 456 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972). 9 CCH Empl. Prac. Dec. at 6593.

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[15] 9 CCH Empl. Prac. Dec. at 6590.

[16] As quoted by the court, that section states:

> "The work behaviors or other criteria of employee adequacy which the test is intended to predict or identify must be fully described. . . . Whatever criteria are used they must represent major or critical work behaviors as revealed by careful job analysis." 9 CCH Empl. Prac. Dec. at 6593.

[17] 9 CCH Empl. Prac. Dec. at 6593. While noting that supervisors had been provided with a list of specific job-related factors to be considered in rating employees under a paired comparison technique, in which each subject is rated individually in comparison with each other subject in the sample (*i.e.*, on a one-to-one basis), the court found that because "individualized analyses for each of the different jobs under consideration" had not been provided, therefore "the rating process here was still principally subjective." *Id.*

In *United States* v. *Georgia Power Co.*,[18] the Fifth Circuit for the first time gave detailed consideration to the question "left unanswered by *Griggs*: what comprises an adequate demonstration that a company's testing program satisfies the proviso of Section 2000e-2(h), as interpreted by *Griggs?*" 474 F.2d at 911. As a result of its consideration, the Fifth Circuit concluded that:

> We do not read *Griggs* as requiring compliance by every employer with each technical form of validation procedure set out in 29 C.F.R., Part 1607 [the 1970 EEOC Guidelines on Employee Selection Procedures]. Nevertheless, these guidelines undeniably provide a valid framework for determining whether a validation study manifests that a particular test predicts reasonable job suitability. Their guidance value is such that we hold *they should be followed absent a showing that some cogent reason exists for noncompliance.* 474 F.2d at 913 (emphasis added).[19]

This statement of the deference to be given the EEOC Guidelines was not itself cause for concern, and there was encouraging recognition by the Fifth Circuit in *Georgia Power* that the specific guideline setting a 95% minimum level of statistical significance (and other guidelines) "must not be interpreted or applied so rigidly as to cease functioning as a guide and become an absolute mandate or proscription."[20] However, the Fifth Circuit repeated and amplified its earlier determination in *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418 (1971), that acceptable validation is not attained in the absence

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[18] 474 F.2d 906 (5th Cir. 1973).

[19] The court also reaffirmed its earlier conclusion in United States v. Jacksonville Terminal Co., 451 F.2d 418, 456 (5th Cir. 1971), that "[c]ertainly the safest validation method is that which conforms with the EEOC Guidelines. . . ." 474 F.2d at 914.

[20] 474 F.2d at 915.

of "*empirical evidence of the relationship between test scores and job performance* [*by blacks*]." 474 F.2d at 914, *citing* 451 F.2d at 456.

While acknowledging professional disagreement as to the soundness of the hypothesis that tests which are valid job predictors for whites may not be equally valid predictors for blacks, the court said that "*the possible fair employment implications are so great as to require separate racial group validation*" as called for in the EEOC Guidelines.[21] Moreover, the court noted with approval the provisions in the Guidelines which, while allowing use of tests to continue on a "provisional" basis where differential validation is not yet technically feasible, require that "the employer *may have to alter or suspend test cut-off scores so that score ranges broad enough to permit the identification of criterion-related validity will be obtained.*" 474 F.2d at 914.

The Fifth Circuit's *Jacksonville Terminal* decision, *supra*, is also noteworthy for its statement that any probability of validity for blacks comparable to that of whites "seems dubious in light of the experience of Roger Stamper [apparently a black], who achieved a relatively low score on the test but who has admittedly functioned satisfactorily as a group 1 employee."[22] This represents a fundamental misunderstanding of the nature of the prediction process, with its essential reliance on probability theory and expectancies. Specific instances of deviation from the expectancies are inherent in the concept of probability, and will occur unless probability gives way to absolute certainty—*i.e.*, unless the correlation coefficient showing the relationship between a predictor

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[21] 474 F.2d at 914 (emphasis added).

[22] 451 F.2d at 456.

and job success is 1.00.[23] Validation merely ensures that the selection device will choose a successful employee with significantly greater frequency than could be expected from pure chance. For *both* blacks and whites, there will always be high test scorers who become unsatisfactory employees, and low test scorers who become satisfactory employees. To focus upon these situations, however, would be to allow the exception to dictate the rule, and would amount to complete rejection of the best available means of selecting employees solely on the basis of qualifications.

C. *The Court Should Articulate the Broad Standards by Which Demonstrations of Job-Relatedness Will Be Reviewed*

The increasingly rigid interpretations by the courts of the Guidelines' technical standards, illustrated by the cases discussed above, fail to recognize the nature of psychological testing and research, and in particular, the purposes for and practical realities involved in the conduct of test validation research. As a result, technical requirements are being imposed which are in some situations contrary to professionally recognized validation techniques, and in others, beyond the present capabilities of industrial psychology. The EEOC Guidelines, as they are being applied, not only require organizations to meet unrealistically restricted standards for the conduct of validation studies, but also to demonstrate more than validity by meeting a "hazy" standard of utility,[24] and to prove that there is no equally valid, less discriminatory

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[23] A correlation of 1.00 indicates a *perfect* positive relationship between two sets of scores, with the scores of each individual occupying exactly the same relative position in both variables. *See* Anastasi, A., PSYCHOLOGICAL TESTING, London: The Macmillan Co., (3d ed., 1970), pp. 71-76.

[24] Harvard Note, *supra* n. 12, at 1128.

alternative. The latter burden of proof has been described as "on its face, impossible to follow." [25]

The strict application of the EEOC Guidelines which has been sanctioned in *Moody*, *Rogers*, and *Georgia Power* is producing pressures on the employment process that are contrary to the fundamental goals of Title VII; rather than encouraging the use of objective selection devices, there is mounting pressure to abandon the use of professionally developed tests and other objective selection mechanisms and resort to quota-oriented or otherwise arbitrary hiring systems. This effect is exacerbated by the absence of any workable administrative mechanism or procedure by which an employer may determine in advance whether the tests desired had been validated in a manner which would satisfy the Guidelines. The less precarious alternative—resort to subjective selection devices—would not only signify a rejection of the value of applied psychology to the employment process, but more importantly, would run counter to "the very purpose of title VII . . . to promote hiring on the basis of qualifications," which this Court recognized in *Griggs*. 401 U.S. at 434. If job qualifications are not to be disparaged, but are to be made "the controlling factor" as called for in *Griggs*, then this Court must set forth standards for reviewing the validation of employment tests which take account of the practical limitations on validation.

II. While Testing Represents the Fairest and Most Reliable Employee Selection Device Currently Available, Its Limitations Must Be Recognized

As discussed above (*see* pp. 2-4, *supra*), the use of professionally developed employment tests should be welcomed as a positive development both for equal employment opportunity and economic efficiency. As the EEOC has itself recognized:

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[25] *Id.*

> The guidelines in this part are based on the belief that properly validated and standardized employee selection procedures can significantly contribute to the implementation of nondiscriminatory personnel policies, as required by title VII. It is also recognized that professionally developed tests, when used in conjunction with other tools of personnel assessment and complemented by sound programs of job design, may significantly aid in the development and maintenance of an efficient work force and, indeed, aid in the utilization and conservation of human resources generally.[26]

The Society fully supports the position that the benefits of professionally developed tests can only be expected from demonstrably valid (*i.e.*, job-related) tests. It must be recognized, however, that the process of validating employment tests through criterion-related validation research [27] is subject to significant practical limitations. These limitations should be taken into account in formulating standards of review for test validation research.

Because of the limitations in the state of the art of applied psychology, courts and reviewing agencies should proceed with great caution to avoid unintended results and unreasonable burdens, and should be prepared to accept considerable variation in method. Although statistics play a major role in criterion-related test validation, it is a dangerous oversimplification to view this process as a strictly routine one, requiring no judgment, to be mechanically replicated in every situation. The attainment of professional acceptability in the validation

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[26] 29 CFR § 1607.1(a).

[27] Because the major administrative and judicial misunderstandings concerning test validation have arisen in regard to criterion-related validation techniques, this discussion is limited to matters affecting these techniques. It should be noted, however, that content and construct validation techniques are also acceptable methods of test validation.

of tests is not an absolute, all-or-nothing proposition. No test is either valid or invalid *per se*; rather, each test must be evaluated in the particular circumstances in which it is used, and each validation study must also be evaluated from such a perspective. As discussed above, research must be adapted to particular applications, and the researcher must be afforded sufficient latitude to devise workable research designs.

By definition, "guidelines" should be considered to be broad standards, rather than precise technical specifications to be followed in all instances. Thus, the "Standards for Educational and Psychological Tests," [28] the authoritative expression of the general rules and principles controlling test use and validation published by the American Psychological Association and cited in the EEOC Guidelines, clearly recognize that they are only research goals or ideals:

> This document is prepared as a technical guide for those within the sponsoring professions; it is *not* written as law. What is intended is a set of standards to be used in part for self-evaluation by test developers and test users. An evaluation of their competence does not rest on the literal satisfaction of every relevant provision of this document. The individual standards are statements of ideals or goals, some having priority over others. Instead, an evaluation of competence depends on the degree to which the intent of this document has been satisfied by the test developer or user. (emphasis in original) [29]

The expertise of the professional industrial psychologist lies in the ability to formulate sound adaptations of

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[28] APA Standards (1974), *supra*, n. 6.

[29] *Id.* at 8.

these general rules and to execute a research design in a particular situation which most nearly conforms to these broad principles of the discipline. In contrast, the EEOC and to a disturbing degree the courts have tried to specify an overly precise methodology for the acceptable validation of all employment tests in all contexts. While some of the principles set forth in the Guidelines accurately reflect the consensus of the psychological community as to the *ideal* research design for test validation, the interpretations given to the Guidelines have reduced the wisdom of the psychology textbook to inflexible and unrealistic legal dogma. In reviewing a particular validation study to determine whether it adequately demonstrates the job-relatedness of a test, the courts and compliance agencies should expect to find wide variation in method, and should accept such variation, so long as the study under review does not disregard or clearly misapply professionally recognized standards and principles. Moreover, determinations of the adequacy of each study must be made on the basis of individualized review of the specific factual setting, with a realistic view of the practical limitations presented.

III. Proposed Standards for Judicial Review of Test Validation Studies

As indicated above, there is an urgent need for this Court to set forth standards for judicial review to be applied by the courts in evaluating an employer's demonstration of job-relatedness under *Griggs*. In this regard, ASPA submits the following principles for consideration by the Court:

—Employers should be required to demonstrate the job-relatedness of a test where significant adverse impact is found.

—Validation techniques should not be applied where they are inappropriate or technically infeasible.

—Job analysis is not necessarily a prerequisite to the conduct of a competent validation study.

—Supervisory ratings of employees' job performance are a legitimate criterion for test validation.

—The weight given to the hypothesis of "differential validity" should reflect its increasingly questionable status.

—Use of a validated test should not be challenged unless a better alternative is proven to be available.

The Society believes that the incorporation of these principles as standards for judicial review of test validation studies would greatly advance the goals of Title VII by establishing a workable framework within which the proper use of objective employment tests would be increased, and hiring based on qualifications rather than bias or guesswork would be encouraged.

A. *Employers Should Be Required to Demonstrate the Job-Relatedness of a Test Where Significant Adverse Impact Is Found*

When it is shown that tests are an operative part of an employment system which results in unfair discrimination prohibited by Title VII, it is appropriate to require that the test user demonstrate that the test is significantly related to job performance (*i.e.*, that it is valid). The job-relatedness of a test may be established by content validation (*i.e.*, a direct comparison of the content of the test and the functional content of the job), criterion-related validation (*i.e.*, an empirical demonstration of a statistical relationship between a test and a significant job behavior), or construct validation (*i.e.*, the demonstration that a human characteristic indicated

by the test is also required on the job). Any of these methods is acceptable under particular circumstances, but the methods are not completely interchangeable; if one technique is inappropriate in a given situation, the others are not necessarily appropriate.

B. *Validation Techniques Should Not Be Applied Where They Are Inappropriate or Technically Infeasible*

No single methodology for the conduct of validation studies should be imposed in all instances of test use. Validation strategies and procedures are determined by the practical realities of a particular application. Just as the use of techniques based on a well-conducted validation study in a less-than-ideal situation is better than the use of techniques unsupported by evidence of validity, so a technically inadequate validation study, or one which attempts to apply a methodology inappropriate to the particular situation, may be *worse* than no study at all. There are situations in which no validation technique may be feasible.

In determining which validation techniques are appropriate, or whether validation research is actually feasible in particular circumstances, the following factors, among others, must be considered:

—the size and characteristics of the applicant or employee sample available for study

—the type and complexity of the job in question

—the rate of change within the job

—the employer's past use of the test in question

—the availability of present employees comparable to the anticipated applicant pool

—the skill, trait or behavior to be predicted.

With regard to the conduct of criterion-related validation studies it is generally agreed within the profession

that such research is not technically feasible unless the sample to be studied is of sufficient size [30] and is composed of appropriate persons.[31] If there are not sufficient numbers of such persons available for inclusion in a criterion-related validation sample, there is *no* meaningful conclusion that can be drawn from the results. Thus, validation in such circumstances should neither be attempted nor required.[32]

C. *Job Analysis is Not Necessarily a Prerequisite to the Conduct of a Competent Validation Study*

Job analysis is the collection of job information of any type, by any means, for any purpose whatsoever. Job

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[30] "The smaller the number of cases in a validation sample, the less reliable the statistics, . . . When *N* (number of persons in sample) is very small, an obtained correlation coefficient of zero may result in the erroneous rejection of a valid test." (Material in parentheses added.) APA Standards (1974), *supra*, n. 6, at 37-38. *See also* U.S. Dept. of Labor, Office of Federal Contract Compliance, "Questions and Answers on OFCC Testing and Selection Order," Washington, D.C. (1974), question No. 26.

[31] "Appropriate persons" is generally defined as a sample of individuals doing essentially the same job and hired during essentially the same time period. *See* Blum, M. L. & Naylor, J. C. INDUSTRIAL PSYCHOLOGY: ITS THEORETICAL AND SOCIAL FOUNDATIONS, New York: Harper & Row (1968), p. 37.

[32] In situations where it is not feasible to conduct a validation study, for any of the reasons discussed above, employers should be prepared to demonstrate the job-relatedness of their tests by other evidence. Such a demonstration may be made in a number of ways such as the following:

—comparison of evidence from validation studies conducted by other employers using the test in relation to similar jobs.

—formation of a consortium of similarly-situated employers for the joint conduct of validation research.

—information from existing test literature and test publishers concerning validity data for the test with regard to the jobs in question.

analysis has no set methodology. Methods range from simple viewing of the job to interviewing supervisors or job incumbents to completing complex checklists or other rating forms.

Job analysis has no fixed content. In some cases it may involve only a collection of information about work outputs such as sales. In other cases job processes (*i.e.*, job tasks) may be of more interest than work outputs. Still, at other times, one may be interested only in the psychological or physical traits involved in doing the job.

Job analysis can serve many purposes. Its most common use by employers is in job evaluation for establishing promotional ladders and pay. Another common use of job analysis is developing training requirements. It also has some use in the test validation process. In criterion-related validation, some types of job analysis can serve as a basis for selection of experimental tests. Other types can be used as the basis for criterion development. Job analysis can also serve as the basis for the development of a test, such as a skill test, which will be evaluated in terms of its content validity.

Since criterion-related validation is the focus here, only job analysis for this type of validation will be discussed in detail. Job analysis for selecting experimental tests often involves having supervisors make ratings on the importance of various psychological traits to job performance. Job analysis of this type, however, is *not* required for a validation study to be competently done. The purpose of the job analysis in this instance is merely to attempt to limit the number of experimental tests to be studied. Other methods such as review of validation studies for similar jobs may be substituted. The measure of adequacy of a test is whether it correlates with a criterion, not whether it is based upon job analysis.

In criterion development, the type and the extent of any analyses involved depend upon the purposes of the research and the validation strategy planned. In general, the more elaborate the criterion planned the more detailed the job analysis should be. Development of a criterion such as a work sample or job knowledge test requires detailed knowledge of job duties. However, if the employer is using turnover as a criterion, no job analysis is required.[33] The employer simply has to know who stays and who leaves. Any analysis of job outputs or tasks would be irrelevant. Similarly, when the employer is using a work output criterion, such as number of letters typed per day, a knowledge of the tasks involved in the typing process, such as rolling the paper in the typewriter, is superfluous.

The role of job analysis in developing supervisors' ratings as criteria deserves careful consideration. When the purpose of conducting a validation study is primarily economic efficiency, as is the case in most employing organizations, a single overall criterion is implied. There is *one* decision to make about the job candidate, *e.g.*, to employ or not employ, and there must be *one* ultimate criterion to reflect the basis for that decision.

As Brogden and Taylor have stated:

> In job analysis for criterion purposes we believe that a clear cut distinction must be made between the end products of a job and the job processes that lead to these end products. It may be pertinent to such other legitimate objectives of job analysis as training or position classification to study the exact sequence of operations in the production of the finished product. The skills needed, the tools used, and the methods employed may all be needed for this

[33] This is contrary to 1607.5(b)(3) of the EEOC Guidelines which imply that job analysis is necessary when behaviors such as tenure are used as criteria.

purpose. Such information does not, however, give a direct answer to the major question, 'How much does the employee produce and how good is it?'[34]

Clearly, it is possible to do a task-oriented job analysis and have supervisors rate performance on each of several tasks. However, if an employment oriented validation study is to be done, these separate ratings must be combined somehow to yield an overall rating. There are no firm rules for this combination process and it is usually subjective. In addition, although there is a logical appeal to a criterion development method involving ratings on separate tasks, it remains to be proven that it is superior to using a simple overall criterion.[35]

Job analysis, as a tool of science, has many limitations.[36] Most of these are related to the fact that any job analysis is merely the controlled use of human judgment. One of the most important limitations is that there is no way to judge the ultimate worth of most job analyses. For example, if a supervisor and a subordinate disagree on the importance of a job task, who is to say who is right? Most jobs do not lend themselves to an objective determination of such matters. Furthermore, the amount of documentation collected does not necessarily have any relationship to the worth of the analysis. A small amount of information collected from those intimately familiar with the job may be more valuable than much more information from those less familiar with the job.

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[34] Brogden, H. E., & Taylor, E. K. "The Dollar Criterion—Applying the Cost Accounting Approach to Criterion Construction," *Personnel Psychology*, Vol. 3 (1950), p. 141.

[35] Kavanaugh, M. J., "The Content Issue in Performance Appraisal: A Review," *Personnel Psychology*, Vol. 24 (1971), pp. 653-668.

[36] Schmidt, F. L. & Kaplan, L. B., "Composite vs. Multiple Criteria: A Review and Resolution of the Controversy," *Personnel Psychology*, Vol. 24 (1971), p. 419-434, which cites several studies in which an overall rating was used as a criterion against which to validate more detailed ratings.

A second severe limitation is the difficulty in translating job analysis information into a form permitting practical decisions. For example, by knowing the tasks a person does, one cannot directly determine the abilities required to perform these tasks. Subjective inferences almost always have to be made in order to apply job analysis information. Various researchers are studying methods to make job analysis more useful and alleviate some of the problems inherent in the various methods,[37] but at present it must be said about job analysis that

> No machine-like procedure of checking off one by one all possible factors has ever been found successful. Instead, the psychologist studies the task with whatever insight and psychological knowledge he can muster. Job analysis is in large measure an art.[38]

In its decision in *Moody*, the Fourth Circuit relied heavily upon Section 1607.5(b)(3) of the EEOC Guidelines to strike down the validation study on grounds of failure to perform a job analysis. 474 F.2d at 139-40. In the validation study at issue, the two primary reasons for job analysis were missing. *First*, there was no need for analysis to select trial tests. *Second*, the validation strategy involved the justifiable use of a single overall criterion to which detailed job analysis is not usually pertinent.[39]

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[37] Fleishman, E. A., Kincade, R. G., & Chambers, A. N., Development of a Taxonomy of Human Performance: A Review of the First Year's Progress, Washington, D.C.: American Institutes for Research (1968).

[38] Cronbach, L. J., ESSENTIALS OF PSYCHOLOGICAL TESTING, New York: Harper & Row, p. 325.

[39] In *Rogers*, the court based its reversal partically upon § 1607.5 (b)(3), despite the fact that the tests had been utilized prior to

[Footnote continued on page 25]

D. *Supervisory Ratings of Employees' Job Performance Are a Legitimate Criterion for Test Validation*

If the researcher has a choice, he or she should use objectively verifiable data in preference to ratings. However, it must be recognized that in most organizational settings objective data are unavailable for most jobs. Objective data which are available often deal with trival aspects of job performance, probably because it is easier to quantify the more unimportant aspects of human behavior. Also objective data are often contaminated by factors over which the employee has no control, such as the failure of a vendor to provide the appropriate material. In general, good ratings by persons well informed about the job are better criteria than trivial or contaminated data, even though they may be objectively verifiable.

The court in *Moody* looked with suspicion on supervisory ratings,[40] and failed to recognize the fact that throughout any validation process, controlled use of human judgment is always involved. It is used in designating the purposes of the study, in conducting job analysis, in developing criteria, and in selecting statistical methods. The end result of a criterion-related validation study is indeed a mathematical expression, but this ex-

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[39] [Continued]
the conduct of validation research, and the employer's expert had conducted a review of pertinent job information. The court concluded, however, that the job analysis was inadequate, apparently because it was not "a careful *quantification* of criteria that 'represent major or critical work behaviors' for the individual jobs." 9 CCH Empl. Prac. Dec. at 6594. We respectfully submit that this indicates once again an over-emphasis on empiricism and a misunderstaning of the fact that any quantification done in job analyses is generally based on assigning numbers to subjective judgments.

[40] 474 F.2d at 138-139. The Eighth Circuit in Rogers v. International Paper Company also looked with suspicion on such ratings, 9 CCH Empl. Prac. Dec. at 6593-94, and cited *Moody* as authority for doing so.

pression is based on a complex combination of mathematics and judgment.

It is recognized that ratings are less than perfect measures of human characteristics. The literature on this is extensive. In addition, while various strategies have been recommended for improving the accuracy of such ratings,[41] it must be carefully noted that ratings are subjective regardless of what operations are performed upon them in the name of objectivity. In summary, for many important aspects of behavior, ratings are not only the most reasonably available measure, but also they are the most relevant measure. In this context, the use of supervisors ratings as criteria must be considered as perfectly legitimate.

The question of bias in ratings deserves special attention. It is well known that biases of many types are associated with ratings ,but one of the problems involved in correcting for biases is that biases are usually impossible to detect. For example, one cannot automatically assume bias if there is a difference in job performance ratings for any two population subgroups. There may be real differences in their actual job performance.

A conclusive study to determine whether such actions as basing ratings on job analysis would reduce racial or sexual bias will probably never be done. There are actually severe questions as to whether the results of even laboratory studies would generalize to any real life settings. There is, however, considerable relevant research which suggests that there are few advantages in complicating rating techniques. Many techniques designed to decrease specific biases and prevent rating

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[41] *E.g.*, Guilford, J. P., PSYCHOMERTIC METHODS, New York: McGraw-Hill, (2d ed. 1954), pp. 263-301.

errors have been ineffective.[42] In addition, ratings of objective aspects of job behavior have not been demonstrably superior to ratings on more subjective aspects of performance.[43] It should also be noted that any decrease in the reliability of a rating caused by lack of specific characteristics to be rated works *against the researcher*. Since the goal of the research is the accurate determination of correlation between test scores and a criterion (*i.e.*, the rating), it is a handicap to the research if the criterion is unreliable. Correlations obtained in such situations would represent *underestimates* of validity.

Finally, supervisory ratings that are developed on the basis of detailed job analyses are no less subjective than overall ratings of job performance. The job analysis is merely the articulation of the composite views of the researcher and, more typically, the supervisors and employees. A rating scale constructed on the basis of such an analysis is merely an aggregation of subjective views on job content. The circular nature of the proposition should be apparent: a rating based on an indirect composite of subjective judgments is not necessarily more reliable than a direct composite of the judgments of the same individuals. Once again, the requirement of certain technical procedures in this area indicates an elevation of form above substance.

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[42] Blumberg, H. H.; Desoto, C. B., & Kuethe, J. L., "Evaluation of 'Rating Scale Formats'", *Personnel Psychology*, Vol. 19 (1966), p. 243-259.

[43] Researchers' attempts to maximize reliability of their efforts by stressing the more concrete in ratings have met with indifferent success, as indicated in a thorough review of the question of subjectivity vs. objectivity in rating content. Kavanaugh, M. J., "The Content Issue in Performance Appraisal: A Review", *Personnel Psychology*, Vol. 24 (1971), p. 653-668.

E. *The Weight Given the Hypothesis of "Differential Validity" Should Reflect Its Increasingly Questionable Status*

"Differential validity" is a term used to describe the hypothesis that there may be differences in the relationship between test scores and job success among identifiable subgroups. Under this theory a single test may possess significantly different levels of validity for blacks and for whites, or for males and females. Differential validation, however, is becoming a less viable proposition within the profession of psychology,[44] and most recent studies have raised severe doubts as to the soundness of the hypothesis. As early as 1969, a report sanctioned by the American Psychological Association concluded:

> This hypothesis, that test scores have different meanings for different subgroups, requires extensive research for confirmation and rejection; existing evidence is inadequate to determine whether aptitude tests actually discriminate unfairly because of their different validities from one subgroup to another.[45]

Since the APA's admonition that further study was needed before this concept could be either accepted or rejected, several new developments have occurred. *First*, differential validation was written into the EEOC Guidelines as a standard to be followed whenever possible.

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[44] APA Standards (1974) pp. 43-44.

> "Unless a difference is observed on samples of substantial size, and unless there is a reasonably sound psychological or sociological theory upon which to explain an observed difference, the difference should be viewed with caution . . . , Users should be aware, however, that a too-hasty acceptance of bias or of differential validity, if used in decision-making, may be as likely to produce unfair test use as is failure to consider the possibility."

[45] APA Task Force on Employment Testing of Minority Groups, Job Testing and the Disadvantages, 24 *Am. Psych.* 637, 641 (1969).

See 29 CFR § 1607.5(b)(5). *Second,* several major reviews of numerous research projects have been published which conclude that tests shown to be valid for the majority group can be expected to be valid for a minority group as well.[46] In a recent analysis of twenty differential validation studies Ruch concluded:

> "If one reads only the conclusions in published articles and monographs, it would seem that differential validity occurs with high frequency . . . If one analyzes the data carefully, however, the evidence for a substantial amount of differential validity evaporates. The seeming high frequency of its occurrence is an artifact of the erroneous statistical logic described earlier." [47]

While acknowledging evidence refuting the notion of differential validity, the Fifth Circuit in *Georgia Power* stated that "the possible fair employment implications are so great" as to require differential validation pursuant to the EEOC Guidelines.[48] The court's decision that every unnecessary barrier to minorities be removed is understandable. Nevertheless, further attention needs to be given to what legal requirements, if any, should be imposed on the basis of this increasingly questionable hypothesis.

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[46] *See* Schmidt, F. L., Berner, J. G., & Hunter, J. E., "Racial Differences in Validity of Employment Tests: Reality or Illusion?" *Journal of Applied Psychology* (1973); Boehm, V. R., "Negro-White Differences in Validity of Employment and Training Selection Procedures," *Journal of Applied Psychology* (1972).

[47] Ruch, W. W., "A Re-analysis of Published Differential Validity Studies," American Psychological Association Symposium on "Differential Validation under EEOC and OFCC Testing and Selection Regulations," September 6, 1972 (aavilable on request). *See also,* Campbell, J. T. "An Investigation of Sources of Bias in Job Prediction, A Six Year Study," Educational Testing Service, Princeton, N. J. (1973); Note, Developments in the Law-Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. at 1129 (1971).

[48] 474 F.2d at 914.

Certainly use of validated tests should not be suspended—for blacks or whites—pending the attainment of feasible conditions for a differential validation study. Moreover, given the lack of evidence supporting differential validation, use of validated tests should not be conditioned on lowering cut-off scores simply to make such a study more feasible.[49] Such a requirement necessarily forces the employer to make selections on the basis of more arbitrary and generally more subjective standards. Instead, employers should be allowed to set and maintain job-related qualifications as high as they choose, as Congress intended[50] and as this Court recognized in *Griggs*.[51]

F. *Use of a Validated Test Should Not Be Challenged Unless a Better Alternative Is Proven to be Available*

When a validation study has demonstrated that a test bears a significant relationship to important requirements of the job(s) for which it is used, the employer has met his burden of showing job relatedness under *Griggs*. However, the EEOC Guidelines would pose two additional requirements which could operate to bar the use of even validated tests. First, the Guidelines require, in addition to a demonstration of job-relatedness, a showing of a "high degree of utility," including a showing that the test has "practical significance or usefulness." 29 CFR §§ 1607.3, 1607.5(c)(2).[52] In addition, the Guidelines would require evidence of the "unavailability

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[49] Section 1607.9 of the EEOC Guidelines suggest such a "lowering of qualifications" in order to facilitate study. This approach was cited approvingly in *Georgia Power*, 474 F.2d at 914.

[50] *See* remarks of Senators Case and Clark, 110 Cong. Rec. 7247.

[51] *See* 401 U.S. at 436.

[52] Moreover, the *Rogers* decision appears to endorse such a requirement, even though the discussion set forth under the heading "Utility of the Test" does not address utility *per se*.

of" suitable alternative selection procedures. 29 CFR § 1607.3.

ASPA submits that neither of these requirements is necessary to the determination of job-relatedness required by *Griggs* and that both serve as deterrents to the use of validated employment tests. While elaborate mathematical formulations have been developed to identify utility,[53] the determination of what is acceptable usefulness remains a wholly subjective consideration. Moreover, it must be remembered that a test which is "valid" is, by definition, *useful* in selecting employees likely to be successful. A test with demonstrated validity must be considered to be superior to any selection device which has not been shown to be valid.[54] However, the EEOC Guidelines, which generally require carefully developed and objective support for each element of the validation process, would forbid the use of a valid test wholly on the basis of a subjective evaluation of its usefulness.

In addition, the requirement of demonstrating the absence of alternative procedures places on the employer the impossible burden of proving a negative. If employers are required to search for alternatives to a demonstrably valid procedure, the process would become so burdensome and never-ending that objective testing could be severely restricted. ASPA does not contend that it would never be appropriate to enjoin the use of a validated test. If a readily identifiable and clearly applicable alternative selection technique of equal validity is proven to have a significantly less adverse effect on minorities than the technique used by the employer, it would be reasonable to require the use of the technique having

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[53] *See* 29 CFR § 1607.8(c)(2).

[54] *See Georgia Power*, 474 F.2d at 914, 917.

the significantly less disparate impact.[55] However, in the absence of proof that such an alternative exists, it seems equally reasonable to permit an employer to continue to use a validated test without requiring continuing efforts to explore the validity of other selection devices.

IV. CONCLUSION

The American Society for Personnel Administration believes that administrative and judicial scrutiny of the methods used by industrial psychologists to develop and apply objective aptitude and ability tests has become so rigid that even the most diligent professional will often be unable to satisfy the requirements imposed and that, as a consequence, many employers will be forced to abandon objective selection techniques altogether, or to hire on a quota-like basis which avoids the appearance of disparate effect. ASPA respectfully submits that the Court, whatever its holding in the present case may be, should continue to recognize the importance of objective selection techniques to the attainment of the objectives of Title VII.

ASPA further believes that both courts and agencies need assistance in formulating the standards of job-relatedness. In practice this need has been filled by reference to either the Guidelines on Employee Selection Procedures, issued by the EEOC—which do not accurately reflect a professional consensus on technical standards for the conduct of validation studies—or the APA's Standards for Educational and Psychological Tests—

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[55] This view is consistent with the conception of the burden of proof in other Title VII cases. While a demonstration of job-relatedness through a validation study meets a employer's burden under *Griggs*, a showing of a valid, available, and less disparate alternative could be viewed as establishing that the use of the existing test, though valid, was a pretext for discrimination. *Cf.*, Green v. McDonnell Douglas Corp., 411 U.S. 792 (1973).

which were never intended to be applied as standards for legal review of acceptability. For this reason, this brief has attempted to set forth standards which would be suitable for legal acceptability.

The discipline of applied psychology, in its work of evaluating and predicting human behavior, is simply not amenable to hard-and-fast formulas and rigid procedures. Thus, even under the standards offered herein, acceptability must not be deemed an all-or-nothing proposition, but must be evaluated and adjudicated on the basis of a thorough consideration of all the facts and circumstances of a particular case and in light of the available alternatives.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-428

HALIFAX LOCAL NO. 425, UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, *Petitioners*,

v.

JOSEPH P. MOODY, ET AL., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONER, HALIFAX LOCAL NO. 425, UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO

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110th Cong. Rec. 7205-7207 (1864); H.R. Report No. 1370, 87th Congress, 2nd Session (1962) 30
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H. Rep. No. 914, Part 2, 88th Cong., 1st Session (1963) 24-25
Labor Relations Law, American Bar Association, 1971 Committee Reports, Volume II, p. 63 26
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-428

HALIFAX LOCAL NO. 425, UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, *Petitioners*,

v.

JOSEPH P. MOODY, ET AL., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR PETITIONER, HALIFAX LOCAL NO. 425, UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO

OPINIONS BELOW

The opinion of the court of appeals (A. 511-537) is reported at 474 F.2d 134. The opinion and order of the district court (A. 473-507), entered November 9, 1971, is reported at 4 FEP Cases 561.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 1973. Petitioner's timely petition for rehearing with suggestion for rehearing in banc was

ultimately denied on July 22, 1974 (A. 548).[1] The order of the court of appeals directing that its mandate be stayed for a period not to exceed thirty days, pending the filing of applications to this Court for a writ of certiorari, was entered on September 13, 1974. The petition for a writ of certiorari was filed October 15, 1974[2] and granted on December 16, 1974.[3] The jurisdiction of this Court rests on 28 USC 1254(1).

QUESTION PRESENTED

Whether in construing the remedial provisions of Title VII of the Civil Rights Act of 1964, the court of appeals, in reviewing a district court's decision and decree, has power to order the trial judge—in this and virtually all other cases henceforth—to award "back pay" as a matter of course to complainants whenever unlawful employment practices are enjoined, despite the Congressional intendment as set forth in § 706(g)

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[1] The highly unconventional course of the antecedent proceedings is detailed in our Statement (*infra*, pp. 12-14), involving as it does the convening of a rehearing in banc which was aborted after oral argument but prior to the issuance of a decision. In view of the subsequent resolution by this Court on June 17, 1974, of a question of judicial administration critical to the granting of the in banc rehearing, certified pursuant to 28 USC 1245(3) (*Moody* v. *Albemarle Paper Co.*, — U.S. —, 41 L.Ed. 358, 91 S.Ct. —), the court of appeals on July 22, 1974 retroactively "denied" the petitions for rehearing and suggestions for rehearing in banc, one of which had been filed by Petitioner herein, and, by the same token, "rescinded" its order for the rehearing in banc, which had been entered July 25, 1973 (A. 548).

[2] October 13, 1974 was a Sunday, while October 14, 1974, fell upon Columbus Day, a national holiday.

[3] The Court, on December 16, 1974, also granted the petition for a writ of certiorari in No. 74-389, filed on behalf of the Albemarle Paper Company and its related corporate entities, and ordered the two cases consolidated.

thereof, that the district court in its discretion, after a trial *de novo,* "may . . . order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay . . ."

STATUTES INVOLVED

The pertinent provisions of Sections 701(b), 703(a), 703(c), 703(h), 705(a), 706(a), 706(e), 706(f), 706(g), 706(k), and 716(a), Title VII, Civil Rights Act of 1964, 78 Stat. 241, 42 USC § 2000e *et seq.;* and 706(g), Title VII Civil Rights Act of 1964, as amended by Public Law 92-261, approved March 24, 1972, 42 USC § 2000e-5(g) are set forth in the Appendix, *infra,* pp. 1a-4a.

STATEMENT

A. The Proceedings in the District Court and Court of Appeals Prior to the In Banc Rehearing (August, 1966—February, 1973)

In November, 1971, the district court concluded, in a suit instituted initially in August, 1966 by four employees against the Albemarle Paper Company (hereinafter, the Company) and Halifax Local No. 425, United Papermakers and Paperworkers, AFL-CIO [4] (the Union, Petitioner herein) under Title VII of the Civil Rights Act of 1964 (42 USC § 2000e, et seq.), that the seniority system of the Company, governing promotions and demotions of employees at its Roanoke Rapids, North Carolina plant, operated to continue the effects

[4] The parent International Union—United Papermakers and Paperworkers, AFL-CIO, CLC—while also named as a party defendant in the Complaint (A. I, 50-51) had not been named in the charge previously filed with the Equal Employment Opportunity Commission, and hence, as a jurisdictional matter, was removed as a party defendant by court order of July 6, 1967, dismissing the action with respect to the International (A. 16-20). This ruling was not contested.

of past discrimination, and ordered it restructured—with the substitution of plant for job seniority as the touchstone.

The district court denied the request for an award of back pay to the class (the suit having in the interim been designated a class action), on multiple grounds, including corrective action that had been taken over the years as well as prejudice to the employer and union defendants resulting from the belated assertion of the monetary claim several years after institution of the action, reversing an earlier and long-standing disclaimer on this score. (A. 498, 502). The trial court also held that the Company had sustained its burden of proving that its pre-employment personnel testing procedures had undergone requisite validation and were job related, hence non-discriminatory.

The trial of two weeks duration was recessed on August 2, 1971, as it neared completion, so that District Judge Dupree—to whose docket the case had been transferred a few months earlier [5]—could utilize the occasion for an on-the-site inspection of the Company's plant in operation, in the presence of counsel for the opposing litigants (A. 493-494).

Following is a resume of the general pattern of plant operations and employment practices, as reflected by the record before the trial court, insofar as material to the question presented in the case at bar.

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[5] Judge Dupree, confronted with a massive case file resulting from the preceding years of discovery, took a number of incisive steps to move the case to trial as expeditiously as possible "consistent with the rights of all parties to a full and fair hearing".

Plant modernization

While the Kraft paper mill has been in operation since 1907, it was not until the 1950's that expansion and modernization of the Company's facilities went forward progressively, including the assimilation of such features as a modern pulp mill and paper machines, followed later by the installation of a modern power plant and other advances in the industry of a highly sophisticated and technically complex nature (A. 346).

A basic factor complicating the Company's problems of recruiting plant production personnel was the greatly expanded production capacity that resulted from the installation of this machinery and equipment valued at several million dollars (A. 346). It was at this point, also, that the "technology of the pulp and paper industry . . . was moving ahead as rapidly as within any 5 or 6 year history of the industry . . . in terms of equipment and in terms of jobs . . .", with computers used extensively through the production process (A. 346). The contrast was drawn between a paper machine producing 10 or 15 tons a day—a small slow-moving installation—and a machine of the modern technology "moving at speeds of 1,500-1,850 feet a minute" for whose operation "a man can no longer depend on his eyesight, on his feel for the job, but he rather must rely on . . . sophisticated technical pieces of equipment" (A. 347).

For the special skills required, the Company resorted to country-wide recruitment, and concurrently sought to utilize those presently employed at the mill, through special training programs, job transfers, and other techniques, since there was no local labor market from which to draw trained pulp and paper mill employees (A. 195, 348).

By way of illustration, the Union cooperated with the Company in the establishment by agreement of a formalized training program for maintenance employees; launched in 1959, the project was known as the Maintenance Apprenticeship Program (A. 105). Company representatives sought to enroll incumbent black employees in the program through personnel solicitation, advertising and personal letters or memos, with a waiver of the then high school education requirement for those found otherwise qualified (A. 105-106).

Seniority practices and their evolution

Throughout the modernization period, certain production and maintenance employees at the plant were covered by collective bargaining agreements, negotiated on their behalf by the Union (A. 87-88). Approximately, 637 persons were employed in production and maintenance jobs (as of mid-1967), of whom about 517 were white and 120 black (A. 87).

As is the standard practice in this industry, operations were conducted on a departmental basis, with the skills and "know-how" in each, not necessarily or readily transposable. Within a given department, when ability was "relatively equal", job seniority was basically the controlling factor for determining promotion and demotion under this system, as comporting with the needs of the industry for requisite on-the-job training of employees at each progressive level (A. 88-89, 95, 193-196).

Accordingly, the collective bargaining agreement provided for several "lines of progression" in which groups of jobs are segmented on a functionally related basis, so that ordinarily experience in one serves as training for the next higher and more complex job in that particular progression line, with the lowest pay at

the bottom and the highest pay at the top of the line (A. 95-96). Thus when a vacancy occurred in a given progression line, the qualified incumbent[6] in the job classification immediately below, who had the greatest length of service at the lower job level, would normally be accorded the first opportunity for the promotion, notwithstanding that other fellow employees in his same job classification had served longer in the department itself or in the plant (A. 96).

Supplementing the progression lines were labor pools for newly hired employees known as the "Extra Boards" or "Call Boards", to which an employee who was demoted due to a reduction in force in a progression line would also revert to await recall (A. 104). This reservoir of employees was used to staff the bottom or entry jobs as they became available in the lines of progression (A. 104).

The various lines of progression were formalized in the mid-1950's; and prior to 1964, certain skilled jobs at the mill and the corresponding lines of progression were for white employees; the other jobs were restricted to black employees in separate lines of progression (A. 88-89). Requests of employees for transfer from one line of progression or department to another line of progression or department were then granted at the sole discretion of the Company; only if the transfer were effected at the Company's request, did the employee retain for a substantial period, the seniority rights of his former status (A. 96-97).

However, under the provisions of the collective bargaining agreement negotiated in 1968, the transferred

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[6] Assuming, "that the person has the necessary ability, experience and training to do the higher job" (A. 96).

employee was protected in his mobility by the benefit of his former rate of pay, in the event it were higher than that of the new job he assumed, a feature referred to in the industry as "red circling" (A. 98). In addition to the "red circling" or rate retention rights afforded transferees under the 1968-1971 labor contract, major changes were made in the merger and intermeshing of formerly segregated progression lines, thereby removing racial restrictions (A. 90, 97-98, 249). The Union's role was substantial in helping to bring about these changes (A. 98-99).

The scope and limitations of the Union's further efforts to effect corrective action

Against this background, the Union had proposed, during the negotiations leading to the 1965-1968 labor agreement with the Company, that a combination of plant and departmental seniority should thereafter determine promotion and demotion within lines of progression, thus eliminating within each department, the *de facto* segregation which then characterized the separate lines of progression (A. 133). This proposal was rejected by the Company representative (A. 134, 250, 255-256).

In the course of these negotiations the Union also proposed, that incumbent black employees be permitted to transfer from the extra boards (containing the employee reserve), or from their lines of progression, into all other lines of progression without being required to satisfy the same prerequisites as outside applicants; *i.e.,* the completion of a high school education and a series of tests (A. 135, 139). This proposal likewise met with rejection, whereupon the Union decided not to elevate either unsuccessful proposal to the status of a strike issue, but to accept the Company's counter-proposals instead (A. 133-134, 146).

In the bargaining negotiations leading to the 1968 labor agreement, the Union made proposals, which, if accepted, would have resulted in the sweeping substitution of plant seniority for job seniority as the controlling factor in promotions, demotions, transfers and layoffs (A. 98-99, 135);[7] upon their rejection, again the membership of the Union voted to accept the Company's more limited counter-proposal as part of a final offer and not to stand upon its original proposals as strike issues (A. 135, 259-260).

With respect to employee qualifications and the "testing" issue, the Union's course of conduct throughout this case was conditioned by the fact that the Company's hiring practices were established unilaterally, without consulting the Union's officers or representatives as to hiring policy or the qualifications required of an application (A. 139, 143, 145, 251). Nor was the subject of testing included in the labor agreement.[8] Moreover, the representatives of the Union were aware that it would be improper to seek any measure of control over hiring practices, in view of the so-called "right-to-work" state statute in North Carolina. (A. 145).

Additionally, the Company reserved to itself the right to make a final decision as to an employee's qualifications for promotions, demotion and transfer (A. 251). Indeed, during the 1968 contract negotiations, the

[7] The Union's proposal was that promotions or transfers go to "the senior qualified employee" and that in "the event of layoff, any qualified employee may exercise his plant seniority to any bottom level job" (A. 98-99).

[8] Notwithstanding, on one occasion when the Company at first deemed two boiler room employees as lacking the necessary qualifications for employment in the new power plant, installed in 1965, the management was persuaded by the Union to utilize them as helpers there, after they had passed a specially designed test and were given further training (A. 235).

Union failed in its effort to include a provision requiring the Company to post notices of job vacancies as they occurred (A. 262).

Less than twenty employees testified either at the trial or by deposition, as representative of the "affected class" in the action; most were barely literate and, on the average, had less than four years of formal education. The Union sponsored classes at the union hall, where a number in this category first learned to read and write or to improve their rudimentary skills (A. 128-129, 131, 151-153, 155, 166). Insofar as the ability to maintain such facilities was concerned, the Union's assets were less than twenty thousand dollars, derived from membership dues of five dollars per month (A. 271).

The individual members of the class, whose testimony is of record, failed, however, to show that they were actually qualified to move up to existing vacancies and could have filled them; some expressed a disinclination to leave their present jobs (A. 131).

The District Court's opinion and order

The district court's findings of fact encompasses a comprehensive review of the Company's seniority system, past and present; upon concluding that it still operated to continue the effects of past discrimination, which had not been eradicated, the trial judge ordered the substitution of a plant-wide seniority system for promotion and demotion when employees of the "affected class are competing with employees not of the affected class and the qualifications of the competitors are relatively equal" (A. 499-500).[9]

[9] In this connection, job residency requirements were ordered also, "based upon minimum tenure required to gain the skill and proficiency" necessary (A. 496-497).

In approaching the issue of back pay, the trial judge adverted to the controlling language of statute, 42 USC § 706(g), noted that it provides "that the court '*may* . . . order such affirmative relief as *may* be appropriate, including reinstatement or hiring of employees, *with or without back pay*' " (his italics), and concluded that the "statute thus speaks clearly in terms of the discretionary power of the court" (A. 497).

On this basis, the trial judge denied the request for back pay stating in part:

> "It appears that the company as early as 1964 began active recruitment of blacks for its Maintenance Apprenticeship Program. Certain lines of progression were merged on its own initiative, and as judicial decisions expanded the then existing interpretations of the Act, the defendants took steps to correct the abuses without delay. And perhaps unlike the tobacco industry involved in *Robinson,* supra [*Robinson* v. *Lorillard,* 444 F.2d 791 (4th Cir. 1971], the paper industry is justified in requiring that its employees possess a certain degree of training and experience. Furthermore, there is evidence to support a finding that Albermarle has consistently paid higher wages at all levels of employment than those paid by other industries in the area—doubtless a reflection of the sophistication of the industry" (A. 498).

An additional "equitable" factor cited by the district court on this score, was the prejudice resulting from the belated assertion of the back pay claim, several years after the initial disclaimer that any such relief was being sought (A. 498).[10]

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[10] As the trial judge noted the claim for back pay was "not prayed for in the pleadings" (A. 498); beyond this, it was specifically disavowed during the first three and a half years that the discovery process went forward (Plaintiff's Memorandum in Opposition to Motion for Summary Judgment, November 22, 1966 (A. 13-14).

Review and reversal by the Court of Appeals

On appeal of the testing and back pay rulings, a majority of the court below, on February 20, 1973, reversed the district court on both issues. Designated and assigned to the three-judge division which heard the case, were the court's two retired or senior judges, along with Judge Craven, who is in regular and active service. A different senior judge joined Judge Craven to constitute a majority for reversal and remand on each ground of appeal—and correspondingly, a different senior judge dissented on each of the two issues.[11] With respect to the question of back pay, separate opinions were filed by each of the three judges, with the majority and dissenting opinions differing sharply on the principles of law and statutory construction that should govern review of the exercise of discretion vested in the trial judge under the statute. (A. 520-524, 524-532, 536-537).

B. The Convening of the In Banc Rehearing before a Nine-Judge Bench and Its Aftermath

The Union, on March 6, 1973, filed a petition for rehearing with suggestion for rehearing in banc, solely on the back pay issue, as did the Company, but with respect to both the back pay and job testing issues.[12] The Union contended in its petition that the majority opinions on the back pay question introduced entirely novel

[11] Thus (1) on the testing procedures issue, Judge Craven and Senior Judge Boreman were in the majority, with Senior Judge Bryan dissenting, while (2) on the back pay issue, Judge Craven and Senior Judge Bryan formed the majority, with Senior Judge Boreman dissenting.

[12] As we have indicated (*supra*, p. 9), the Union took no part in the argument on the testing issue, essentially a management prerogative outside the scope of conventional collective bargaining.

concepts in judicial interpretation and enforcement of the relevant statutory provisions, with a resultant holding that marked a wide departure from the settled principles theretofore endorsed by the court below and the other circuit courts of appeals; it urged further that the majority opinions, for all practical purposes, precluded the trial court, in this and all other such potential suits generated at the district court level, from exercising any degree of discretion on the remedial issue of back pay awards, and—contrary to the statutory concept—placed back pay on a virtually mandatory basis.

On June 25, 1973, the court below entered an order granting the petitions for rehearing in banc, with the statement that "a majority of the judges in regular active service, plus Senior Judges Boreman and Bryan, who were members of the original panel, have voted to grant the petitions." Following the filing of supplemental briefs, all parties participated in oral argument at the in banc rehearing convened on October 2, 1973, with the bench composed of the seven active and two senior judges of the court below. However, a decision was never finally issued, notwithstanding a "tentative vote" to "modify the panel decision with respect to an award of back pay" (A. 540).

This Court held, the question having been submitted in the interim by certificate of the court below pursuant to 28 USC § 1254(3),[13] that "senior circuit judges who

[13] As summarized by this Court: "It had been the practice of the Fourth Circuit to count the votes of their senior judges who were members of the original hearing division when the court acted on the question whether to order a rehearing in banc. In those cases, however, the votes of the senior judges were not crucial. Certificate, at 3. [A. 543] Here, their votes are crucial. In Moody, while a 'majority of the circuit judges of the circuit who are in regular active service' did not vote for a

are members of the originally assigned division hearing a case are not authorized by Congress to participate in the determination whether to rehear that case in banc". *Moody* v. *Albemarle Paper Co.*, — U.S. — 41 L.Ed. 358, 360, 362, 94 S.Ct.—(June 17, 1974).

In deference to this Court's decision, the court below, on July 22, 1974, declared that its order entered a year earlier "setting this case for rehearing in banc" was currently "rescinded" as "improvidently entered", and the initial "petitions for rehearing and rehearing in banc" were "denied" (A. 548). Thus the initial decision and judgment of the three-judge panel were reinstated.[14]

C. The Initial Panel Decision on Back Pay to Which the Court of Appeals Reverted

The divided three-judge panel of the court of appeals, reversing the district court's discretionary refusal to award back pay, held that "a plaintiff or a complaining class who is successful in obtaining an injunction under Title VII of the Act, should ordinarily be awarded back pay unless special circumstances would

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rehearing in banc, the two senior judges who sat on the division by designation did so vote; their votes, if counted, would make a majority for rehearing . . . . Accordingly, all Circuit judges of the Fourth Circuit in regular active service and both senior judges of the Circuit have . . . certified to us the question whether a senior judge of the circuit who was a member of the original division hearing a case may vote to determine whether the case should be reheard in banc." *Moody* v. *Albemarle Paper Co.*, *supra*, 41 L.Ed. at 360.

[14] Upon motion filed by both the Company and the Union, the court of appeals recalled its judgment (issued in lieu of mandate) and granted a stay of mandate not to exceed thirty days from September 13, 1974, pending the filing of petitions for a writ of certiorari. *Cf.*, Federal Rules of Appellate Procedure, 28 USC Rule 41(b).

render such an award unjust" (A. 523-524; footnote omitted). This new back pay doctrine was premised in essential part on the view that "a district court must exercise its discretion as to back pay in the same manner it must exercise discretion as to attorneys' fees under Title II of the Civil Rights Act"; thus, the majority concluded that either "are to be awarded as of course in the absence of 'special circumstances' " (A. 525). In the majority view, the district court "must exercise its discretion to this end in awarding back pay because of its "compensatory nature" and the "strong congressional policy embodied in Title VII" (A. 523). The rarity of the "special circumstances" that would be required to obviate a back pay award was illustrated by the example put forward of the legal necessity of complying with state protective legislation, such as that limiting the hours of work for female drivers, as a defense against charges of employment discrimination.[15]

"Strenuous objections" to the foregoing rationale were raised by the dissenting judge, who pointed to "the fallacy" of equating the granting of attorneys' fees under Title II of the Civil Rights Act of 1964 [in accordance with *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400 (1968)], with back pay under Title VII of the Act (A. 525). In concluding that "the award of back pay, unlike the grant of attorneys' fees, is an element

[15] The majority stated: "For examples of such special circumstances said to justify refusal of a back pay award, *see* Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002 (9th Cir., June 20, 1972); Le Blanc v. Southern Bell Tel. & Tel. Co., 333 F. Supp. 702, 610-11 (E.D. La. 1971), *aff'd*, *per curiam*, 460 F.2d 1228 (5th Cir. 1972)" (A. 524). In the *Schaeffer* case such a factor was held exculpatory until the statute relied upon was declared invalid. The *LeBlanc* case, *supra*, presented a closely analogous situation.

of affirmative relief which has been entrusted to the more general discretion of the district courts", the dissenting opinion emphasized the significance of two factors: (1) that "the congressional separation of these two provisions indicated an intent to treat them independently"; and (2) that while back pay is among "the equitable remedies which the district court may use in fashioning relief", there is no evidence of "congressional intent to give an award of back pay any greater presumption of appropriateness than its companion remedies" (A. 526; footnote omitted).

The dissenting opinion further stressed the impropriety of overriding the "equitable balancing power" vested by statute in the district court, which is charged "with the more delicate task of fashioning the appropriate equitable relief to fit the peculiar fact pattern of each case"—a function "properly left in the hands of the district courts which are more intimately involved with the ambiance of the cases and the merits of each position than are the Courts of Appeal" (A. 527-528; footnote omitted).

SUMMARY OF ARGUMENT

The majority opinion and ruling of the court of appeals is at odds with the plain language and Congressional intent expressed in Section 706(g), Title VII of the Civil Rights Act of 1964. That section invokes the traditional equity powers of the district court, as confirmed by landmark cases decided by this Court, and specifies that the trial court may award or decline to award back pay to complainants on a discretionary basis. The ruling below, however, requires that back pay be awarded on a mandatory basis (in the absence of rarely encountered "special circumstances") in the

event the district court finds and enjoins unfair employment practices under Title VII of the Act.

The court of appeals by its ruling, which constitutes a turnabout from uniform judicial precedent previously established in cases arising under Title VII, has thereby overreached its review function and undercut the exercise of discretion reserved to the district court. The appropriate test on review is whether this discretion has been exercised in an arbitrary or willful manner, or rather with an eye to what is right and equitable under the circumstances. The dissenting opinion correctly states that the "term 'discretion' denotes that more than one acceptable alternative is available and the choice of the most appropriate is properly left in the hands of the district courts which are more intimately involved with the ambiance of the cases and the merits of each position than are the Courts of Appeal."

Beyond this, the court below, by placing a premium on litigation for monetary recovery, has upset the equilibrium of Title VII of the Act, which places primary reliance on the conciliation process for securing compliance and effectuating the legislative policies.

ARGUMENT

Introduction

The decision below is highly vulnerable on two grounds: (1) the court of appeals' unwarranted intrusion into the forbidden area preempted by the legislative authority of the Congress; and (2) improper interference with the exercise of traditional equity powers vested in the Federal district courts and specifically invoked by the plain language and import of the controlling statutory provision. Respondents' basic con-

tentions in support of the decision below are similiarly flawed as we shall show.[16]

While this Court has previously decided a series of cases arising under Title VII of the Civil Rights Act of 1964 (hereinafter the Act), presenting limited issues of a procedural or substantive nature,[17] the case at bar is the first of such dimensions as to invite an examination of whether the court of appeals has overreached its review function vis-a-vis the district court and has breached the doctrine of separation of powers by seeking to substitute judicial for legislative judgment.

The holding below on its face contravenes an elementary and time-honored canon of statutory construction; where the language of a statute, as here, is couched in plain and unambiguous language, it must be given effect according to its plain and obvious meaning.[18] The legislative command to the district court as expressed in Section 706(g) of the Act, is that upon enjoining unfair labor practices, it "may order such affirmative action as may be appropriate" and that such remedial measures "may include reinstate-

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[16] We believe this is true also of the views advanced by the Equal Employment Opportunity Commission together with a division of the United States Department of Justice, on whose behalf briefs *amici curiae* and oral argument, were presented below (see, *infra* p. 27, fn. 30).

[17] E.g.: *Love* v. *Pullman Co.*, 404 U.S. 522 (1972) (prior oral referral to a state agency by the EEOC); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) (whether a "demonstrable relationship" exists between scores obtained by testing and actual job performance); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) (whether a prior arbitration award is a bar to Title VII action).

[18] E.g.: *Hilton* v. *Sullivan*, 334 U.S. 323 (1948); *U.S.* v. *Sullivan*, *332* U.S. 689 (1948); *Ex parte Collett, Ill. & Ky.*, 337 U.S. 55 (1949); *Packard Motor Car Co.* v. *N.L.R.B.*, 330 U.S. 485 (1947).

ment or hiring of employees, with or without back pay".

How then, it may be asked, can the majority below read and construe this language to mean that when an injunction issues, back pay "should ordinarily be awarded" concomitantly—except in rarely encountered special circumstances. The question is all the more trenchant since the common denominator of the prior decisions, including those in the circuit below, was—as stated by this Court as recently as February, 1974—that in "Title VII cases the Courts of Appeals have characterized back pay as an integral part of an equitable remedy . . . and have relied on the fact that the decision whether to award back pay is committed to the discretion of the trial judge". *Curtis* v. *Loether*, 415 U.S. 189, 197 (1974).

Illustrative of this Court's evaluation is a typical statement by a court of appeals that "this language [of Section 706(g), *supra*] leaves the award or denial of back pay to the discretion of the district court, to be exercised in the light of all the circumstances of each case". *Kober* v. *Westinghouse Electric Corp.*, 480 F.2d 240, 246-247 (3rd Cir., 1973).

If more were needed, the legislative history on this score is incisive and unequivocal, and in direct confirmation of what the statutory language, as initially understood by the courts, already makes clear. Thus, while the original version of the bill in the House of Representatives provided for mandatory affirmative relief (H.R. 7152), this provision was reversed in the Senate (Amendment No. 656). As Senator Dirksen explained: [19]

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[19] 110th Cong. Rec. 12381-85 (June 5, 1964).

> "The mandatory requirement for affirmative action, including reinstatement and back pay, upon a finding of violation, has been revised to read '*may* . . . order such affirmative action as may be appropriate, which *may* include reinstatement and back pay' ". (Emphasis added.)

Further illumination of the Congressional intent with respect to the question at hand is provided by reference to the 1972 Amendments to Title VII of the Act.[20] Over seven years after enactment, the original discretionary pattern of Section 706(g) was etched even more sharply by adding to the "affirmative action" feature pinpointed above by Senator Dirksen (*viz*, "such affirmative action as may be appropriate"), the option of "any other equitable relief as the court deems appropriate" [21]—in addition to the specific options of "reinstatement or hiring of employees, with or without back pay" previously designated in the original 1964 enactment. Thus Congress further strengthened the hand of the district court to tailor its decree to the requirements of the particular case.

Nevertheless, the court below, almost a year after the 1972 amendments were approved, moved in the opposite direction to adopt an inflexible position with respect to this key remedial provision—reintroducing a mandatory element which the Congress had rejected both in 1972, and earlier in 1964. To rule, as did the majority below, that "a district court must exercise its discretion as to back pay . . . under Title VII of the Act", so that it "should ordinarily be awarded" along

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[20] The Equal Employment Opportunity Act of 1972, Public Law 92-961, approved March 24, 1972.

[21] Appendix, *infra*, p. 4a.

with injunctive relief, is not only to state a contradiction in terms but to strip the term "discretion" of any real meaning, notwithstanding its importance as a basic concept in jurisprudence.

In so doing, the majority below abruptly turned away from the prevailing judicial precedent in cases arising under Title VII of the Act, seriously overreached the "function of the court of appeals"; that "is to review the relief the district court grants in the light of the findings and supporting record and determine if there has been an abuse of discretion,[22] but not to "substitute its discretion for that of the district court".[23] By the same token, the holding of the court below constituted "an intrusion into the legislative field", contrary to the "mandate of the Congress" which is expressed in statutory language that "is clear and specific". *Schnell* v. *Eckrich & Sons*, 365 U.S. 260, 262-263 (1961).[24]

I

The Mandatory Back Pay Ruling Below Impairs the Exercise of Discretion and Equity Jurisdiction Vested in the District Court

Before the advent of the decision below, the earlier standard of review to which the court of appeals subscribed was stated in the following terms:

> "The fashioning of effective and appropriate relief depends in part on the discretion of the district court. The function of the court of appeals is to review the relief which the district court grants in

[22] *United States* v. *Dillon Supply Co.*, 429 F.2d 800, 804 (4th Cir., 1970).

[23] *Larson* v. *United States*, 296 F.2d 167, 170 (8th Cir., 1961).

[24] See also, e.g.: *Ebert* v. *Poston*, 266 U.S. 547; *Louisville and National Railroad Company* v. *Mottley*, 219 U.S. 466.

> light of findings and the supporting record and to determine if there has been an abuse of discretion". *United States* v. *Dillon Supply Co.,* 429 F.2d 800, 804 (4th Cir., 1970).

The majority below, in reversing the trial judge's discretionary refusal to award back pay, conceived an entirely new and contrasting formula, which, in the last analysis, leaves the district court with no choice but to accompany injunctive relief with an award of back pay to forestall reversal (absent "special circumstances," as noted above).[25]

The ruling, it should be noted in passing, is adapted almost word for word from that announced by this Court to govern the assessment of an attorney's fee in suits under Title II of the Act (barring discrimination in places of public accommodation). In *Newman* v. *Piggie Park Enterprises,* 300 U.S. 400,402, the Court concluded:

> "A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority [footnote omitted] .... *It follows that one who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.*" (Italics supplied.)

The dissenting opinion below, as we have indicated, stresses the fallacy of equating grants of attorney fees

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[25] Some of the other courts of appeals subsequently followed this lead. E.g.: *Pettway* v. *American Cast Iron Pipe Co.,* 494 F.2d 211, 252-53, (5th Cir., 1974); *Head* v. *Timken Roller Bearing Co.,* 486 F.2d 870, 876 (6th Cir. 1973).

in Title II suits with back pay awards under Title VII of the Act. This formidable objection aside, what are the consequences of ignoring the provisions in Section 706(g), *supra,* which "characterized back pay as an integral part of an equitable remedy" calling into full play the equity powers of the district court, with the "decision whether to award back pay committed to the discretion of the trial judge"? (*Curtis* v. *Loether, supra,* 415 U.S. at 197). The short answer, we submit, is that the court of appeals cannot do without committing fatal error.

As this Court stated in *Hecht Company* v. *Bowles,* 321 U.S. 321, 329-330:

> "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims."

The opinions of the Court, particularly those which have come to be recognized as landmarks in the development and application of this doctrine, are replete with expressions of a similar nature. They are familiar to the Court and it is not necessary to repeat them here *in extenso;* a few examples will suffice.

The Court has over the years reiterated the principle that a court of equity is not inflexibly bound to direct any particular form of relief; rather, it has full power to grant or withhold the particular relief sought by fashioning a remedy which will best serve the ends of justice in the particular circumstances. In *Lemon* v.

Kurtzman, 411 U.S. 192, 199, 200 (1973) Chief Justice Berger said:

> "But however we state the issue, the fact remains that we are asked to reexamine the District Court's evaluation of the proper means of implementing an equitable decree. (citation omitted). In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow *Swann* v. *Charlotte-Mechlenburg Board of Education,* 402 U.S. 1, 15, 27 n 10, 28 L.Ed.2d 554, 91 S. Ct. 1267 (1971)."

See also: *Mills* v. *Electric Auto Light Company,* 396 U.S. 375 (1970); *Gilbertville Trucking Company, Inc.* v. *United States,* 371 U.S. 115, 130 (1962); *United States of America* v. *W. T. Grant Company,* 345 U.S. 629, 632 (1953); *Burns* v. *United States,* 287 U.S. 216, 222-223 (1932); *Lagnes* v. *Green,* 282 U.S. 540, 541 (1931).

The full significance of the foregoing judicial authority for this branch of our argument may be more readily appreciated by again turning briefly to the legislative history of the Act, including that of the 1972 Amendments. A key figure in the passage of the entire 1964 Act, Congressman McCullough, explained the changes resulting in the sharp delineation of authority as between the Equal Employment Opportunity Commission and the Federal judiciary:

> "As the title was originally worded, the Commission would have had authority to not only conduct investigations, but also institute hearing procedures and issue orders of a cease-and-desist nature. A substantial number of committee members, however, preferred that the ultimate determination of discrimination rest with the Federal

judiciary." H. Rep. No. 914, Part 2, 88th Cong., 1st Session (1963).[26]

Thus Congress made a clear-cut choice[27] to which it steadfastly adhered, notwithstanding that a bill was being introduced in every session since the Act was passed in 1964, and was the subject of particularly sharp controversy in the debate of the 1972 Amendments,[28] to give the Equal Employment Opportunity Commission decisional and cease-and-desist enforcement powers like that of the National Labor Relations Board, subject only to limited review in the Federal Circuit Courts of Appeals.

In the course of drafting and enacting the 1972 Amendments, Congress considered the back pay provision but amended it only by including a provision that back pay shall not accrue from a date more than two years prior to the filing of a charge (Appendix, *infra*, p. 4a). Congress may also be presumed to have been aware of the state of the pre-1972 decided cases (*supra*, pp. 19, 21). Under these circumstances, the inference is irresistible that it was because Congress approved the approach which the majority below has since abandoned, that it reinacted the Section 706(g), *supra*, in-

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[26] Congressman McCullough was ranking minority member of the House Judiciary Committee.

[27] When that legislative body chooses to provide a remedy for infringement of Congressionally established rights, it has the alternative of providing only an administrative remedy, a judicial remedy subject to exhaustion of administrative remedies, an option of either administrative or judicial remedies, or only judicial remedies. *Tatum* v. *United States*, 270 U.S. 568, 576-77 (1925); *Curtis* v. *Loether*, *supra*.

[28] The Equal Employment Opportunity Act of 1972, Bureau of National Affairs, pp. 162 ff. (1973).

cluding the back pay provision, without material change.

In the foregoing frame of reference, there would appear to be little support in law or logic for respondents' position below, which will apparently be renewed in this forum, that "Title VII's remedial scope cannot be abandoned to the varying and inconsistent interpretations of hundreds of district judges" (Brief below, pp. 40-41), or to their "essentially standardless and unfettered discretion", thus inviting "arbitrary or willful decisions" (p. 9, Brief of Respondents In Opposition to Petitions for Certiorari in Nos. 74-428, 74-389).

While this is not essential to our argument since the Congress has spoken, respondents' pessimistic evaluation of the district courts' standard of performance in Title VII cases, does not comport with that of objective observers, who report that these courts "have not been reluctant to order a broad spectrum of affirmative action, including an extensive revamping of established seniority and referral systems", and that their decrees reflect "innovative affirmative action requirements in the context of both industrial and craft union situations."[29]

Moreover, the Federal district court bench has for many years been engaged in fashioning remedies for infringement of legal rights in a variety of complex fields, so that the ramifications of Title VII actions are hardly so exceptional as to strain its capacity. Surely, the dissatisfied litigant in an antitrust suit, for example, would be given short shrift in complaining that the district courts should not be entrusted with the task of

[29] Section of: Labor Relations Law, American Bar Association, 1971 Committee Reports, Volume II, p. 63.

drafting effective remedial decrees to curb restraint of trade or monopolistic practices found unlawful. Nor do we find in Article III of the Constitution or any of the applicable statutes, any suggestion of incompetency requiring that the district courts' normal function be truncated or inhibited in cases involving a particular variety of legislation such as that now before the Court.[30]

We think it obvious that respondents' phrase, "unefettered discretion," is a rhetorical device that has no place or meaning in the legal lexicon. The discretionary award or refusal to award back pay, of course, calls for the reasoned and conscientious judgment of the trial court—a discretion exercised not arbitrarily or willfully—that is traditionally measurable

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[30] The foregoing comments are applicable as well to the contentions urged below on behalf of the Equal Employment Opportunity Commission (Brief below, *amicus curiae*, pp. 33-40) emphasizing the contrary manner in which the Commission would have resolved this aspect of the case, were that agency vested with the discretionary authority, it seeks to minimize when exercised by the district court. There is equally little merit in the related position asserted at the rehearing in banc (Brief For The United States and The Equal Employment Opportunity Commission As Amicus Curiae, p. 22, fn. 6):

> "The discretion which can be exercised by administrative agencies while limited, is of course, broader than the discretion which can be exercised by a trial court in a Title VII suit. . . . A trial court has none of the expertise of an administrative agency; its discretion is therefore narrower and the scope of judicial review consequently more searching."

The conclusion drawn above is, we think, indefensible. Moreover, judicial notice may be taken of the fact that the past years have witnessed a searching reexamination of the administrative agency as an institution, including a diagnosis of its many ills. It is, therefore, unrealistic at this late date to idealize the administrative agency technique. In any event, the choice was for the Congress to make and that choice has been made.

and reviewable by the court of appeals. Indeed, as this Court declared long ago the "question is simply whether there has been an abuse of discretion and is to be determined in accordance with familiar principles governing the exercise of judicial discretion". *Burns* v. *United States, supra,* 287 U.S. at 222-223.

Judicial judgment in fashioning a remedial order according "to what is right and equitable under the circumstances" (*Lagnes* v. *Green, supra,* 282 U.S. at 541), should be permitted here, as under the National Labor Relations Act from which the back pay concept was derived,[31] so that the trial court may avail "itself of the freedom given it by Congress to attain just results in diverse, complicated situations"—including or excluding back pay, which is not "mechanically compelled by the Act" (*Phelps Dodge* v. *N.L.R.B.,* 313 U.S. 177, 198 (1941).

Finally, we submit that if ever a case dramatized the need to return to the accepted standard of review traced above, rather than the preemptory rule announced by the majority below, it is this one. Commenced in mid-

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[31] See, e.g.: Legis. Hist. Titles VII and XI of Civil Act of 1964, at 3015, 3039, 3041 (EEOC, undated). Indeed, historically "back pay." and reinstatement had been tools available to the National War Labor Board in 1918, the National Labor Relations Board acting under Section 7(a) of the National Industrial Recovery Act, and also the only court faced with remedying a discharge in violation of an injunction issued under the Railroad Labor Act. *Matter of Corn Products Refining Co.,* Docket No. 130, decided November 21, 1918, reported in U.S. Dept of Labor, Bureau of Labor Statistics, Bulletin No. 287 (Dec. 1921), National War Labor Board, pp. 183-184 (Gov't Printing Off., 1922); *Matter of Chicago Defender, Inc.,* 1 NLRB (old) 119, 122, decided October 20, 1934; *Brotherhood of Railway and S.S. Clerks* v. *Texas & N.O.R. Co.,* 24 F.2d 426, 434 (S.D. Tex.), affirmed 33 F.2d 13 (C.A. 5), affirmed, 281 U.S. 548.

1966 and pending in the district court for some five years, this case covers almost the entire time span since the effective date of Title VII of the Act under which it was brought. The development of the guiding principles for application of this novel legislation to the employment patterns of industrial enterprises and their progressive implementation by the courts went forward concurrently.

Perusal of the record before this Court will disclose an exemplary handling and mastery of the details of a case by the trial judge, who noted that it had "grown to almost unmanageable proportions" at the time it was assigned to him. The conduct of the trial itself, including a personal inspection of the Company's plant and the evenhanded treatment accorded the opposing parties, was in the best judicial tradition.

The trial judge has summarized the principle factors (*supra*, p. 11) upon which he relied for his discretionary refusal to award back pay.[32] The Company in its Brief has treated this aspect in full measure and we shall not burden the Court with a recapitulation here.

Speaking for the Union, we think that its overall conduct and serious efforts to meet the requirements of Title VII of the Act, at the critical turns of its bargaining negotiations with the Company, are fully compatible with the underlying equitable considerations that support the action of the district court in declining to order a monetary assessment. Noteworthy also in this connection was the Union's program to improve the literacy of some of its less well endowed members as well as other efforts to promote their job advancement.

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[32] Nor do we understand that the trial judge's opinion and order must articulate all of the factors on which his discretionary judicial action was based.

In the last analysis, as was well stated by the dissenting judge below: "The term 'discretion' denotes that more than one acceptable alternative is available and the choice of the most appropriate is properly left in the hands of the district courts which are more intimately involved with the ambiance of the cases and the merits of each position than are the Courts of Appeal." (A. 527-528). Accord: *Kober* v. *Westinghouse Electric Co.*, 480 F.2d 240 (3d Cir. 1973). The result in question was providently reached and is an entirely equitable one.

It will be recalled that the trade union community and leadership had long been in the forefront, at the national level, of those advocating the passage of Title VII of the Act and earlier legislation of the same nature.[33] Beyond this, the Union here represents both white and black employees who must continue to work in harmony, side-by-side at the wheels of industry and in union affairs. At best, the difficulty in readjusting and accommodating diverse interests under the trial courts' decree, restructuring seniority, should not be underestimated. Where the relative rights of seniority are affected, it is axiomatic that improvement of one employee's status inevitably depreciates that of another.

Court decrees are not self-enforcing and require our sustained efforts. We doubt, however, that is was contemplated in any quarter, at the time the Act was adopted, that a local trade union that has conducted itself such as this one, would be required, no matter what the circumstances, to participate financially in under-

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[33] 110th Cong. Rec. 7205-7207 (1864); H.R. Report No. 1370, 87th Congress, 2nd Session (1962).

writing the effects of the social and economic imbalance of the past, which the Act was designed to eliminate.

II

Intrusion into the Legislative Sphere by the Court of Appeals

We suggest that another serious consequence of the decision below is that it marks an appreciable intrusion by the court of appeals into the legislative realm, with the substitution of judicial for legislative judgment in areas where Congress has affixed its own clear imprimatur with respect to Title VII of the Act.

In enacting Title VII and making it mandatory that the Equal Employment Opportunity Commission "*shall* endeavor to eliminate any such alleged employment practice by informal methods of conference, conciliation and persuasion" (Appendix, *infra,* p. 3a, Section 706(a), 42 USC 2000e(5)(b), (italics added)). Congress established a statutory scheme which seeks to utilize these techniques to the full in remedying employment discrimination.[34] The court decisions have uniformly implemented this legislative objective, and the 1972 Amendments to Title VII, carry forward a renewed faith by the Congress in the efficacy of this

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[34] As one student of the legislative history stated:

> "Congress apparently decided that the objectives of the Act could be better served by giving the informal measures of conciliation and persuasion a chance to work . . . . The conciliation process has several features which recommend it: it may solve problems without the animosities created by coercion; it gives the respondent a chance to explain and possibly justify his conduct before litigation receives widespread public attention; it is less expensive and time consuming than litigation; and broad relief is available . . ." 84 Harvard Law Review 1109, 1199-1200 (1971).

approach.[35] By virtually guaranteeing complainants under the Act, an award of back pay or differential pay, if discrimination is judicially determined under whatever circumstances, the majority opinion would place an undue premium on litigation, however protracted, in derogation of the conciliation feature of the Act.

In a recent case, for example, the United States Court of Appeals for the Eighth Circuit emphasized that "negotiation and voluntary compliance remain the primary mode of enforcement" of Title VII objectives, notwithstanding that the 1972 Amendments to the Act permit the Equal Employment Opportunity Commission to bring suit, after certain prerequisites have been satisfied. The court held that the Commission's failure to give the employer the required notice of imminent termination of conciliation efforts, barred the Commission's suit because—

> "Compliance with the regulation, a last gesture by the commission of a conciliatory attitude, may well give pause to the most recalcitrant employer. Faced with expensive and time-consuming litigation, the employer may be motivated to resolve the dispute in the congressionally preferred forum."

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[35] In introducing the conference report of House Resolution No. 1746, Representative Perkins stated:

> "Conferees contemplate that the Commission will continue to make every effort to conciliate as is required by existing law. Only if conciliation proves to be impossible do we expect the Commission to bring action in federal distrct court to seek enforcement." Cong. Rec.—House, p. 1861 (March 8, 1972).

EEOC v. *Hickey-Mitchell,* 43 LW 2274 (8th Cir. December 11, 1974)

The ruling below, in our view has a double-edged effect. By virtually guaranteeing a monetary award along with injunctive relief, it shifts the center of gravity and balance of Title VII from conciliation to litigation, contrary to the Congressional design.[36] Beyond this, the compromise from mandatory to discretionary back pay that constituted an important legislative tactic—to help insure passage of the Act in the economic and social climate of the mid-1960's—has been nullified and the rejected mandatory approach reinstituted. This, we submit, works judicial mischief with the legislative process and is impermissible.

It should be added, that conciliation and settlement where feasible, is a welcome alternative to this and other trade unions, faced with the practical problems posed during the initial decade of Title VII on the national scene. Our aim is to make as rapid an adjustment as possible and get on with the main business of a trade union—employee representation in collective bargaining and allied matters—a goal long since an integral part of the nation's labor policy, the overall objectives of which must be preserved.

[36] It is noteworthy that this may further tend to escalate the burgeoning caseload confronting the Federal court system, of which the Court is acutely aware.

CONCLUSION

For the reasons stated, we respectfully submit that the decision of the court of appeals should be reversed, with directions to affirm the order of the district court denying the request for an award of back pay.

Respectfully submitted,

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APPENDIX

APPENDIX

DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGION, SEX OR NATIONAL ORIGIN

SEC. 703. (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * * * * * * * * *

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin.

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

* * * * * * * * * *

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin ***

* * * * * * * * * *

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SEC. 705. (a) There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party, who shall be appointed by the President by and with the advice and consent of the Senate. * * *

* * * * * * * * * *

PREVENTION OF UNLAWFUL EMPLOYMENT PRACTICES

SEC. 706. (a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this title has occurred (and such charge sets forth the facts upon which it is based) that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization (hereinafter referred to as the "respondent") with a copy of such charge and shall make an investigation of such charge, provided

that such charge shall not be made public by the Commission. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as part of such endeavors may be made public by the Commission without the written consent of the parties, or used as evidence in a subsequent proceeding. * * *

* * * * * * * * * *

(e) If within thirty daws after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) (except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this title, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

(f) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title.

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by

the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice).

• • • • • • • • • • •

706(g), Title VII Civil Rights Act of 1964, as amended (by Public Law 92-261, approved March 24, 1972, 42 USC § 2000(3)-5(g)):

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

• • • • • • • • • • •

(k) In any section or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

• • • • • • • • • • •

SEC. 716. (a) This title shall become effective one year after the date of its enactment.

• • • • • • • • • • •

SUPREME COURT, U. S.

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-389

ALBEMARLE PAPER COMPANY, ET AL.,
Petitioner,

vs.

JOSEPH P. MOODY, ET AL.,
Respondents.

No. 74-428

HALIFAX LOCAL NO. 25, UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO,
Petitioner,

vs.

JOSEPH P. MOODY, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF PETITIONER ALBEMARLE.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-389

ALBEMARLE PAPER COMPANY, ET AL.,
Petitioner,

vs.

JOSEPH P. MOODY, ET AL.,
Respondents.

No. 74-428

HALIFAX LOCAL NO. 25, UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO,
Petitioner,

vs.

JOSEPH P. MOODY, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF PETITIONER ALBEMARLE.

INTEREST OF THE AMICUS CURIAE.*

The Chamber is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade and

* Consents of all parties to the Chamber's participation have been filed with this Court.

professional associations, a direct business membership in excess of 38,000 and an underlying membership of approximately 5,000,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

The Chamber regularly represents the interests of its member-employers in important labor relations matters vitally affecting those interests. Such representation constitutes a significant aspect of the Chamber's functions. Accordingly, the Chamber has sought to advance those interests in a wide spectrum of labor relations litigation before this Court.**

The questions presented in the instant case are matters of continuing importance to the Chamber. The first question is whether the legality of job validated tests must depend upon rigid compliance with the Equal Opportunity Commission's testing guidelines. The second major question is whether the discretion of a trial court to deny back pay may be rendered nugatory by a reviewing court's direction that this award is mechanically to be given as of course.

In this case, the court below held that the Employer's employment testing procedures violated Title VII since these procedures did not precisely comport with the Equal Employment Opportunity Commission's testing guidelines. Thus, the court below, contrary to Congressional purpose as manifested in Title VII (Section 703(h)) and to this Court's decision in *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971) viewed the Commission's testing guidelines as mandatory and determined that the

** *E.g., Connel Construction Company, Inc.* v. *Plumbers and Steamfitters Local Union No. 100, etc.*, No. 73-1256; *Marco DeFunis, et al.* v. *Charles Odegaard, et al.*, No. 73-235; *Super Tire Engineering Company* v. *McCorkle, et al.*, No. 72-1554; *Corning Glass Works* v. *Brennan*, No. 73-29; *N. L. R. B.* v. *Bell Aerospace Company Division of Textron, Inc.*, No. 72-1598; *N. L. R. B.* v. *The Boeing Company, et al.*, 93 S. Ct. 1952; *N. L. R. B.* v. *Granite State Joint Board*, 409 U. S. 213 (1972); *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971).

legitimacy of even job related tests depends upon rigid compliance with these guidelines.

The court below also held that a back pay award must be a virtually automatic remedy once a discriminatory employment practice is found to have occurred. In arriving at this conclusion, the decision below ignored the broad discretion to fashion appropriate relief explicitly conferred upon district courts by Section 706(g) of Title VII, and instead forestalled the meaningful exercise of this discretionary power by finding that back pay must be awarded "unless special circumstances would render such an award unjust."

The questions here are of particular concern to the Chamber and its members since any rules that may emerge will exert a substantial impact upon the testing procedures and economic vitality of these members. The rules articulated by the court below and supported by the Commission would freeze the diverse and complicated factual patterns of Title VII cases into inflexible molds. Thus, all employment tests to be legitimate would have to comport strictly to the manifold requirements of the guidelines and back pay would be awarded as of course once discrimination is found regardless of the employer's good faith, job availability or employee qualifications.

Indeed, the Commission itself has stated that no test can comply with the testing guidelines. If the decision of the court below is adopted, employers would be required to forego employment testing and resort to hiring by quota rather than to attempt futilely to conform to the multitude of complex and perplexing guideline requirements. As a consequence, important tools to predict and to evaluate job success will be abandoned in direct contravention to the purpose of Title VII and to this Court's decision in *Griggs*. The Chamber is, thus, vitally concerned that the questions here be properly resolved.

There are other questions at least implicitly raised by this case whose answer will have significant impact on fair em-

ployment policy. For example, some courts of appeals have endorsed awarding back pay to a class and then permitting the class to allocate this award to all individual class members regardless of individual financial loss. The *amicus* urges that this Court consider whether this type of an award should be granted in light of the compensatory nature of the statute's remedial provisions.

Because of its broad representation of employers, the Chamber is in a position to present arguments to this Court which might not otherwise be advanced by the parties.

SUMMARY OF THE ARGUMENT.

Both this Court in *Griggs* and Congress have required only that employment tests be related to the jobs for which the candidate is being evaluated. However, neither this Court nor Congress have accorded substantive weight to the manifold perplexing provisions of the Equal Employment Opportunity Commission's testing guidelines or decreed that these guidelines be strictly heeded as a precondition to obtaining an employment test that is legitimate under Title VII. The requirement enunciated by the court below,—that employers must conform their employment testing procedures to the standards articulated in the Commission's guidelines in order to comply with Title VII,—would compel employers to forego testing, contrary to the design of that Act and this Court's *Griggs* decision. Indeed, the Commission has acknowledged that there are no known or available employment tests which *can* satisfy the provisions of the testing guidelines, and that it would require in its opinion years before an examination could be developed that would fulfill the directives of these guidelines. Consequently, following the decision below, all employment testing will violate Title VII. Conversely, if the decision below is reversed, as it should be, courts will adjudicate each case upon the presented evidence and a determination of a test's validity will be based upon a reasonable rather than an inflexible standard.

There are additional and compelling reasons that require this Court to articulate that employment tests need not conform to all of the provisions of the Commission's guidelines in order to comply with Title VII. While employment tests are valuable tools to predict the probability of successful job performance, the intricacies of the testing requirements are impossible for many employers to follow. Consequently, if this Court permits the decision below to stand and thereby allows the guidelines to become the inflexible standard against which all employment tests are measured, employers abandoning tests, will be encouraged to resort to a quota system of hiring. That is, the surest way to escape conflict with the Commission and to avoid exhaustive and futile attempts to match the guidelines' criteria is to hire a requisite percentage or number of minority group members without relying upon any testing procedure.

However, hiring by quota not only fosters reverse discrimination, but also is contrary to the mandates of Title VII and the Constitution's Equal Protection guarantees. It follows that to preserve the purpose of Title VII and the concept of meritocracy embedded in the Civil Rights Act and the Constitution, this Court must enunciate that the Commission's testing guidelines will not be used as the inflexible standard to determine the legitimacy of an employer's testing program. In light of the foregoing principles, it is apparent that the Employer has validated its testing procedure and related it to the jobs in all lines of skilled employment, consistent with the directives of *Griggs* and Title VII, though the testing procedure may not have passed each of the guidelines' manifold and intricate requirements.

Turning to the second major issue presented, it is evident that Congress intended a district court hearing a Title VII case to have broad discretion to determine the remedy once discrimination is found. The decision below in requiring that back pay be mechanically awarded once discrimination is found contravened

this apparent congressional intent. The remedial provisions of Title VII were patterned after those of the National Labor Relations Act. Just as the Labor Board was to have maximum discretion to fashion remedies, so too the trial courts under Title VII were congressionally intended to enjoy such discretion. It is antithetical to this congressional purpose to permit a reviewing tribunal in Title VII to severely restrict the circumstances under which a trial court may opt to deny back pay and to require that back pay be granted automatically whenever unlawful discrimination is shown. The court below determined that back pay is to be awarded to a successful plaintiff as of course by erroneously extending this Court's holding in *Newman* v. *Piggie Park Enterprises* (390 U. S. 400, 1968), concerning the awarding of attorney's fees, to embrace the grant of back pay relief.

Furthermore, this Court should enunciate a principle whereby it proscribes granting back pay for an entire class found to have been victims of discrimination. That is, once discrimination against a class has been found there should be a separate determination on an individual basis as to who is entitled to recovery and the amount of this recovery.

Moreover, this Court should require trial courts to limit the class size to include only those persons reasonably likely to be awarded back pay. This Court should permit a trial judge in his discretion to determine the appropriate award in a second hearing following the hearing on the merits. In this manner the primary purpose of Title VII,—to provide jobs and promotion opportunities,—will be effectuated without delay caused by computing monitary awards. Conversely, if back pay is granted as of course employer-defendants would be entitled to a trial by jury which would delay the expeditious resolution of Title VII proceedings. At present, most authorities have justified denying a jury trial to Title VII defendants by relying on the fact that back pay is an integral part of an equitable remedy with the decision whether to award this relief committed to the discretion of the

trial judge. Deprivation of jury trial can be justified—if at all—only so long as the discretion of the trial court is untrammelled by restrictions such as those imposed by the court below.

ARGUMENT.

A. The Legality of Job Validated Tests Must Not Depend Upon Rigid Compliance with the Commission's Testing Guidelines.

1. This Court in Griggs, Consonant with Congressional Intent, Endorsed the Utilization of Job Related Tests and Did Not Condition Their Legality Upon Adherence to the Commission's Guidelines.

In *Griggs* this Court held that when an employment test is related to the jobs for which the candidate is being evaluated, its use is legitimate even though this utilization may disqualify members of minority groups.[1] This holding is in accord with the intent of Section 703(h) of Title VII as revealed by relevant Congressional commentaries. Thus, legislative debates on this section of Title VII were spawned by a decision by the Illinois Fair Employment Commission in *Myart* v. *Motorola Co.* which implied that employers were forbidden to use any tests—including those that were job related or justified by business need—on which whites performed superior to blacks. In reacting against this decision, Congress disavowed *Myart's* implications and determined to insure that employers would be permitted to use job related tests even when these examinations resulted in an adverse impact upon a minority group.[2] Accordingly, an amendment offered by Senator Tower was adopted as in harmony with the

1. *Griggs* v. *Duke Power Co., supra, at* 434, 436. "Tests" include all employee selection procedures.

2. 110 Cong. Rec. 6415-16; 7213 (Comments Senators Clark and Case); 13492-503 (Comments Senator Tower); 13504 (Comments Senator Humphrey).

purpose of Title VII and was included as part of Section 703(h).[3]

While this Court and Congress have required job related tests, there is no suggestion in either the *Griggs* decision or in the legislative chronicles encompassing Section 703(h) that the intricacies of the testing guidelines must be satisfied before an employment examination may be declared valid under Title VII. In *Griggs* this Court considered the question of whether Title VII proscribed the utilization of a general intelligence test as a condition of employment or promotion when this test was *not* shown to be related to successful job performance. (at 424.) In resolving this issue, this Court held that, "What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract." (at 436.) In reaching this decision in *Griggs* this Court endorsed the Commission's construction of Section 703(h) only to the extent that job related examinations are mandated by the Act: ". . . the EEOC's construction of Section 703(h) to require that employment tests be job-related comports with Congressional intent." (at 436.)

Thus, this Court did not, by deciding *Griggs*, unqualifiedly endorse each of the complex requirements of the Commission's testing guidelines. Indeed, this Court did not undertake the task of analyzing the intricacies of these guidelines, in order to determine if each provision was consonant with Congressional purpose; such an analysis is an apparent prerequisite to endorsing the guidelines *in toto*.[4]

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3. In pertinent part Section 703(h) states:

"(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin . . ." 78 Stat. 255, 42 U. S. C. § 2000e-2.

4. While this Court stated that the guidelines expressed Congressional will, the context of this statement, together with the failure to

Furthermore, it is apparent that Congress did not condition the validity of employment tests upon strict compliance with the provisions of the guidelines. Congress has not reviewed the promulgation of these regulations and there is no indication that the many aspects and complexities of test validation were ever considered by congressmen responsible for Title VII.[5] In addition, Congress permitted the Commission to issue only *procedural regulations* and thus did *not* empower that agency to promulgate rules having the binding force of substantive law.[6] Accordingly, it is transparent that Congress did not desire to accord substantive weight to the Commission's guidelines or to require rigid adherence to their provisions.[7]

In sum, neither this Court nor Congress has accorded substantive weight to the manifold perplexing provisions of the Commission's guidelines or decreed that they be strictly heeded as a precondition to obtaining an employment test legitimate under Title VII.

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examine the guidelines' provisions, indicates that this Court was referring only to the Commission's construction of Section 703(h) to require job-related tests. (*Griggs*, pgs. 433-436.) Inasmuch as the testing guidelines are now under revision, this Court should give no deference or credence to them at this time. Rather this Court should remand this case to the Trial Court to consider testimony on whether the present guidelines are psychologically supportable.

5. *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1126 (1971) hereinafter referred to as *Developments—Title VII*.

6. Title 42 U. S. C. § 2000e-12(a) (1964).

7. It is evident that the Commission itself did not view its testing guidelines as equivalent to binding substantive law when these rules were issued. Thus, when these regulations were formulated, neither public notice was given nor public hearing held as required by the Administrative Procedure Act when substantive matter is involved. Title 5 U. S. C. Section 553(b)(3)(A) (1967). Blumrosen, *Strangers in Paradise; Griggs* v. *Duke Power Co. and the Concept of Employment Discrimination*, 71 Mich. L. Rev. 59, 61, 97 (1972).

2. If the Legitimacy of Employment Tests Depends Upon Conformation with the Content of the Guidelines, Employers Will Be Forced to Abandon Valuable Job Related Tests.

A requirement that employers must conform their employment testing procedures to the standards enunciated in the Commission's guidelines in order to comply with Title VII would compel employers to forego testing, contrary to the design of Title VII and this Court's *Griggs* decision which expressly endorse the use of testing procedures. Thus, the decision below which enunciates this requirement must be reversed.[8] The Court of Appeals for the Fifth Circuit has, like the court below, exceeded the directives of *Griggs* and Congress by determining that the Commission's guidelines are a mandatory standard that employment tests must meet to be lawful under Title VII. In *Pettway* v. *American Cast Iron Pipe Co.*, 494 F. 2d 256 (1974), that court stated, ". . . we note that the company has at no time attempted to validate its tests under the EEOC guidelines, 29 C. F. R. 1607, which we found *mandatory* in *Georgia Power.*" (emphasis added)[9] In addition, in *Rogers* v. *International Paper Co.*, ... F. 2d ....., 9 E. P. D. Par: 9865 (1975) the Court of Appeals for the Eighth Circuit held that the testing guidelines "control" when an employment test's validity is under examination. Moreover, the Commission itself, despite the absence of this Court's mandate or legislative authorization has indicated that mechanical compliance with each provision of its guidelines is a prerequisite to securing an

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8. The court below, unlike this Court in *Griggs* or Congress, has decreed that in order to comply with Title VII, an employer must demonstrate that his test has been validated in strict accordance with the Commission's guidelines. 474 F. 2d at 139.

9. The *Pettway* court referred to its decision in *Georgia Power* concerning the guidelines which held:

> Their guidance should be followed absent a showing that some cogent reason exists for noncompliance." *United States* v. *Georgia Power Co.*, 474 F. 2d 906, 913 (1973).

administrative determination that an employment test is lawful under Title VII. (EEOC Decision, Paragraph 6329, CCH, 1973.)

The decision below, like those of the Fifth and Eighth Circuits and Commission referred to above, promotes insurmountable problems for employers as they attempt to comply with Title VII. Thus, the Government has acknowledged that there are no known or available employment tests which *can* satisfy the provisions of the Commission's guidelines, and that it would require at least two years before an examination could be developed that would fulfill the directives of these guidelines.[10] Consequently, unless this Court reverses the decision below, *all* employment testing will violate Title VII. That is, if employers are required to conform their employment tests to the Commission's standards as manifested by the guidelines, and if no test can meet these standards, then all employment testing will be unlawful. It follows that enforcement of the decision below could completely foreclose testing since employers will abandon this procedure rather than engage in costly and futile contests with the Commission. On the other hand, if the decision below is reversed, courts will adjudicate each case upon the presented evidence and the determination of a test's validity will be based upon a reasonable rather than an inflexible standard.[11]

There are additional and compelling reasons that require this Court explicitly to articulate that employment tests need not conform to all the provisions of the Commission's guidelines in order to comply with Title VII. While employment tests are valuable tools to predict the probability of successful job performance, the intricacies of the testing requirements are "impos-

10. *United States* v. *Georgia Power Co.*, 3 EPD Par. 8318, at pp. 7086, 7092 n. 8 (N. D. Ga. 1971).

11. See, *Civil Rights Law—Fair Employment Testing and Title VII of the Civil Rights Act of 1964*, 20 Kansas L. Rev. 334, 342-43 (1972).

sible for many employers to follow."[12] The complexities of these requirements present oppressive and opaque directives to employers who, rather than chancing a misstep, will likely abandon all objective and job related testing programs.

In the first place, even when an employer is able to demonstrate that his chosen test predicts satisfactory job performance for both blacks and whites, the guidelines place an additional and insurmountable burden upon him if this test leaves blacks underrepresented.[13] In this situation, the employer must additionally *prove* that no alternative hiring, promotion or transfer procedure is available to him that will enable a greater number of blacks to be hired or promoted. (Section 1607.3.) This requirement is impossible to meet. How can an employer *prove* that something does *not* exist? For example, if utilization of a clearly job related test leaves an employer with less of a percentage of blacks than are available in the hiring region, how can he *establish* that alternative methods, such as interviews, would not increase black representation and would not provide equally satisfactory employees.[14]

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12. *Developments—Title VII, supra,* at 1131.

Testing to predict job success, while still a developing science has become increasingly important due to jobs being more complex and bargaining agreements virtually insulating even incompetent employees from discharge. *Employment Testing: The Aftermath of Griggs* v. *Duke Power Company,* 1972 Colum. L. Rev. 900. Professionally developed tests, despite imperfections, are far superior tools to predict job success than are unstructured employment interviews. These tests are "standardized" (the conditions are identical for each applicant), "efficient" (job related information can be quickly collected) and "amenable to objective analysis" (results are subject to statistical evaluation). Moreover, these tests are designed to measure job success regardless of the applicant's race, religion, sex or national origin. Brief of American Society for Personal Administration.

13. Since blacks are prominent in Civil Rights litigation, this brief will refer to them; however, the arguments advanced have equal validity if protected minorities other than blacks are involved.

14. *Developments—Title VII, supra,* at 1130.

Despite the impossibility of following the alternative showing directive, the Commission has required strict adherence. Thus, in EEOC Decision, Paragraph 6329, CCH, 1973, the Commission acknowl-

Second, the guidelines, unlike Title VII or *Griggs*, impose the requirement of differential validity upon employers. (Section 1607.5(b)(5).) Differential validity represents a *Commission presumption* that a test may be valid for one *race*, but not another, or that blacks, while scoring lower on a test will nonetheless perform equally as well as whites on a given job. However, there is very little evidence that supports the Commission's presumption.[15] Nevertheless, if the guidelines are held to be an inflexible standard that employment tests must meet to comport with Title VII, employers will be compelled to maintain test data by racial groups and endure the attendant problems therewith involved. That is, adequate differential studies require large samples of black or other minority employees to be hired at a similar time as whites and work with whites on similar jobs. Very few employers can fulfill this necessary requirement for effective differential studies. Furthermore, the cost of conducting such studies would be nearly prohibitive and particularly onerous when there is substantial evidence that the notion of differential validity has no merit whatever. Moreover, if a test is shown to be differentially valid, it is likely due to the factor of cultural deprivation affecting both whites and blacks rather

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edged that a test was job related, but nonetheless found its use violated Title VII since the employer did not prove that alternative procedures with less adverse impact upon blacks were unavailable. Moreover, the court below, in an earlier decision, *Robinson* v. *Lorillard*, 444 F. 2d 791 (CA 4, 1971) imposed an identical burden upon an employer.

In addition to being impossible to follow, the alternative showing requirement represents an extension of this Court's *Griggs* decision and the mandate of Congress which necessitate only that a test be job related. Similarly, unlike *Griggs*, the guidelines oblige an employer to demonstrate that his testing procedure has "utility." (Section 1607.3.)

15. According to Boehm, *Negro-White Differences in Validity of Employment and Training Selection Procedures: Summary of Research Evidence*, Journal of Applied Psychology, Vol. 56 No. 1 pgs. 33-39 (1972) "there is very little evidence of differential validity . . ." Barrett, *Grey Areas in Black and White Testing*, 46 Harv. Bus. Rev. 92, 94 (1968) agrees with Boehm.

than race. Therefore, compelling data to be collected by racial groups and lowering the passing score for blacks will exert an adverse impact on many whites who, while as culturally deprived as blacks, are judged by scores and standards applicable to more advantaged white employees. Finally, it is inescapable that racial prejudices will be exacerbated if blacks with lower scores are selected for hire or promotion over whites with higher scores.[16]

Accordingly, the requirement that tests must be differentially validated, like that of alternative procedures, exceeds the purpose of Congress and the rule of *Griggs*, and is virtually impossible to meet; if tests must conform to these directives, employers will abandon testing rather than continue examinations and in effect solicit findings of unlawful discrimination.

The Commission's guidelines forestall an employer who desires to use meaningful tests in still another way. In effect they interdict testing for other than entry level jobs unless promotion is "nearly automatic" even though employers generally desire to hire promotable employees and would test accordingly.[17] Hiring promotable employees permits the employer to select from a maximum number of candidates those to promote. Thus, to prohibit tests which enable him to determine promotability and to instead require him to hire the minimally qualified frustrates a legitimate business objective, works against the more qualified employees of all races and thereby undermines this Court's rationale in *Griggs*. (pgs. 434-436.)

The guidelines dictate still another requirement that will cause an employer to forego testing if strictly enforced by the courts.

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16. *Developments—Title VII, supra,* at 1129.

17. Indeed, the Petitioner hires employees into a "pool". From this pool, the employee may move to any one of a number of lines of progression. Since it is not known at the time of hire in which line the employee will be placed, it is both logical and beneficial to employer and employee that a newly hired worker be able to move from the pool to any line. Accordingly, contrary to the reasoning of the court below, the Petitioner should not be proscribed from using a test that predicts job performance on any line.

Section 1607.11 proscribes the imposition of new job related tests upon minority groups whose members, but for earlier discrimination, would have been granted the opportunity to be hired or promoted under less stringent standards previously in force. Consequently, if compelled to comply with this directive, an employer will be obliged to use double standards: members of some minority groups will be measured against lenient criteria while all other employees and applicants will be graded on the standards of the new more stringent job related test. This double standard will have an immediate effect: employer-employee relations will deteriorate and racial tensions will be augmented. Moreover, while the present beneficiaries of this required testing procedure likely will not be those persons actually discriminated against in the past, the double standard's victims will be white workers required to pass the more stringent test to secure employment or promotion. It follows that employers will likely abandon all testing rather than attempt to cope with the problems caused by the double standard requirement.[18]

The upshot is that the decision below occasions manifold problems for employers who desire to utilize tests to secure and promote their ablest applicants. The Commission's guidelines endorsed *in toto* as mandatory by the court below appear designed to frighten employers away from using job related hiring or promotion standards that exert an adverse impact upon members of minority groups.[19] While this may be the Commission's intent, it is contrary to the expressions of Title VII (Section 703(h)) and to this Court's decision in *Griggs*. It follows that the decision below must be reversed and courts instructed to determine a test's legitimacy by relying upon a standard of reasonableness rather than upon the absolute criteria of the guidelines.

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18. This requirement also offends the rationale of *Griggs* which expressly allowed employers to set standards of job related tests as high as they deemed necessary.

19. *Developments—Title VII, supra*, at 1127-1131.

Conversely, if this Court permits the decision below to stand and thereby permits the guidelines to become the inflexible standard against which all employment testing is measured, employers abandoning tests will be encouraged to resort to a quota system of hiring. That is, the surest way to escape trouble with the Commission and to avoid exhaustive and futile attempts to match the guidelines' criteria is to hire a requisite percentage or number of minority group members without relying upon any testing procedure. While this method may discriminate against the qualified by eliminating any shadow of hiring on the basis of merit, the guidelines will not be triggered and the weight of the Commission and the courts will not fall upon the employer.[20] However, as will be demonstrated next, quota hiring is attended by its own legion of problems.

3. Employers, Forced to Forego Testing Rather Than Futilely Attempting to Meet Inflexible Guideline Standards, Will Resort to Quota Hiring to Avoid Conflicts with the Commission.

The impossibility of complying with the guidelines and the Commission's mandate that results be achieved will compel quota hiring.

a) *Hiring by Quota Is Contrary to the Mandate of Title VII.*

Title VII, as originally enacted, reflected the mainstream of social thought on remedying discriminatory practices.[21] However, Title VII was never intended to favor quotas or goals preferring minorities at the expense of other groups on the employment scene. Thus, Senator Kuchel commenting on the proposed bill in 1964 observed that a court "cannot order *preferential hiring* or promotional consideration for any particular race, religion, or other group." (110 Cong. Rec. 6563-64 (1964),) (Emphasis added.) Senator Humphrey agreed with

20. Of course, the employer is deprived of better qualified employees. If the decision below is enforced with respect to testing, accepting this deprivation appears to be his only viable alternative to engaging in a costly and losing bout with the Commission over test validation.

21. Cooper and Sobol, *Seniority and Testing Under the Fair Employment Laws*, 82 Harv. L. Rev. 1598, 1607-1611 (1969).

these observations and, commenting on Section 703(j), emphasized that Title VII does not authorize or permit the imposition of preferential minority employment goals as a means of remedying past discriminatory employment practices:

> "Title VII does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group." (110 Cong. Rec. 12723 (1964).)

Again, Humphrey stated:

> "... *There is nothing in* [*Title VII*] that will give any power to the Commission or to any court *to require hiring, firing, or promotion* of employees, in order *to meet a racial 'quota'* or to achieve a certain racial balance." (110 Cong. Rec. 6549 (1964).) (Emphasis added.)

An identical view is acknowledged by Senators Clark and Case:

> "[An employer] would not be obliged—or indeed, *permitted*—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier." (110 Cong. Rec. 7217 (1964).) (Emphasis added.)

The original determination of Title VII unequivocally to preclude minority preference quotas was reaffirmed by congressional commentaries surrounding the 1972 amendments to Title VII. Thus, Senator Javits (who sponsored many bills which culminated in the 1972 amendments) explicitly stated that Title VII was an "anti-discrimination" measure and was not intended to produce "affirmative action". (118 Cong. Rec. S. 161 (Daily Edition, January 20, 1972).) Senator Javits thereby acknowledged that color-blindness was a cornerstone of Title VII and that the Act mandated that race, religion, sex and national origin be irrelevant to securing or retaining employment. Javits' remarks, just as those reflected in the 1964 commentaries, demonstrate that Title VII is underpinned by the concept of meritocracy whereby immutable personal character-

istics such as race are not relevant to an individual's employment qualifications.

It is patent that the concept of meritocracy is fostered by job related employment testing. As demonstrated, this testing can continue only if the Commission's guidelines do not become an inflexible standard to measure an examination's legitimacy.[22]

Indeed, this Court has recognized that minority preference quotas are inconsistent with the directives of Title VII and the nation's equal opportunity policy. Thus, in *Griggs* this Court stated:

> "*[T]he Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.* What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." (401 U. S. at 430-31.) (Emphasis added.)[23]

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22. Title VII is successful primarily because, as originally intended, it reflects strong and just economic and social needs. The use of quotas or goals *preferring* an individual because of race is as detrimental to these needs as is denying employment because of racial characteristics.

In addition, hiring by quota without regard to merit resurrects the criterion of color as a basis for obtaining employment and thereby contravenes the "color-blind" intent of Title VII.

23. Other courts have followed this Court's guidance: in *United States* v. *Jacksonville Terminal Co.*, 451 F. 2d 418 (CA 5, 1971), *cert. denied*, 406 U. S. 906 (1972), the Court rejected the proposition that Congress condoned discrimination against nonminority groups that would result from the imposition of minority preference goals. In the closely related area of plant seniority, the Court of Appeals for the Seventh Circuit has clearly stated the intent and purpose of Title VII with respect to minority preference goals:

> "Title VII speaks only to the future. Its backward gaze is found only on a present practice which may perpetuate past discrimination. An employment seniority system embodying the 'last hired, first fired' principle does not itself perpetuate past discrimination. To hold otherwise would be tantamount to

Consistent with the design of Title VII, as reflected in the legislative history and judicial decisions, white employees are entitled to statutory protection identical to that granted to blacks.[24] However, hiring by quota to achieve an acceptable proportion of minority group members declares that this protection is illusory and, moreover, renders the purpose of Title VII nugatory since such quotas realistically can only resurrect racial antagonism.[25] As shown, the impossible requirements of the Commission's testing guidelines endorsed by the decision below appear intended to force employers to abandon all objective testing and resort to hiring and promoting by minority preference quotas to avoid trouble with the Commission. Accordingly, to reassert the purpose of Title VII, this Court must firmly declare that the validity of job related tests does not depend upon rigid compliance with these guidelines.

b) *Minority Preference Quotas Contravene the Constitution's Equal Protection Guarantees.*

The constitutional prohibitions of the Fifth and Fourteenth Amendments are directed against all manifestations of racial or national origin discrimination regardless of the purpose of such discrimination. Consonant with its unequivocal proscription against all forms of discrimination, the Constitution must be forever color-blind. This mandate of the Equal Protection Clause eloquently demonstrates an awareness that society's prejudice and intolerance will be terminated only by the aboli-

shackling white employees with a burden of past discrimination created not by them but by their employer. Title VII was not designed to nurture such reverse discriminatory preferences." *Waters* v. *Wisconsin Steel Works*, ... F. 2d ..... (CA 7 August 26, 1974).

To the same effect is *Franks* v. *Bowman Transportation Co.*, 495 F. 2d 398 (CA 5, 1974).

24. See quotation from *Griggs* v. *Duke Power Co.*, above at page 18 (401 U. S. at 430-1).

25. *Hughes* v. *Superior Court*, 339 U. S. 460, 464 (1950).

tion of distinctions based upon race, sex or national origin.[26] Conversely, racial bigotry will be resurrected and perpetuated by administrative policy or judicial decisions whose effect is to shift the inequities from one person to another solely because of immutable and supposedly irrelevant characteristics.

Leagued against these fundamental precepts stand all administrative or judicial mechanisms that encourage the utilization of quotas or goals that prefer "minorities" for employment opportunities solely because of their race, sex or national origin. Such mechanisms include not only the strict enforcement of the Commission's testing guidelines as heretofore demonstrated, but for government contractors, the requirements of affirmative action programs as well. Thus, contrary to the Constitution which commands that neither white nor black applicants can be lawfully denied employment because of race, the effect, and indeed the intent, of the advocates of rigid enforcement of the testing guidelines and affirmative action programs is to deprive qualified whites of employment in order to give priority treatment to blacks simply because of their racial characteristics.[27]

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26. Senator Charles Sumner of Massachusetts, the chief architect of the equal protection clause, defined his concept of equal protection in an argument before the Supreme Court of Massachusetts in *Roberts* v. *Boston*, 59 Mass. (5 Cash.) 198 (1849) in an effort to overturn the state's segregated school law:

> "He may be poor, weak, humble, or black—he may be of Caucasian, Jewish, Indian, or Ethiopian race—he may be of French, German, English, or Irish extraction, but before the Constitution of Massachusetts all these distinctions disappear. He is not poor, weak, humble, or black; nor is he Caucasian, Jew, Indian, or Ethiopian; nor is he French, German, English or Irish; he is a Man, the equal of all his fellow-men." 2 Works of Charles Sumner, 341-342 (1974).

Though Sumner lost the case, the segregation law was immediately thereafter repealed, and Sumner's concept became the basis of the equal protection clause. Frank and Munro, *The Original Understanding of Equal Protection of the Laws*, 1972 Wash. U. L. Q. 421 (1972).

27. Where limited employment opportunities exist, preference for blacks obviously results in rejection of others. Unlike the educational cases (*Swann* v. *Charlotte Mecklenberg Board of Education*, 402 U. S.

That is, as shown, too stringent enforcement of the requirements of the testing guidelines forestalls all testing and results in the abandonment of the concept of meritocracy, resurrects distinctions based upon color or sex, and thereby deprives qualified nonminority applicants of the equal protection of the law.

It should be evident that minority preference programs, including viewing the testing guidelines as mandatory, are bent upon eliminating the effects of past racial discrimination rather than upon rectifying discrimination directed against certain individuals. However, to utilize racial preferences to the benefit of the favored minority to achieve this goal is to contravene the constitutional guarantee of equal opportunity.[28]

Moreover, in the case of employment opportunities, the encouragement of minority preference quotas to eliminate past discrimination will have the inevitable consequence of creating *present* or reverse discrimination against others equally qualified who are conveniently labeled as "non-minority". Thus, the intrusion of quotas into the employment system results in present and future white applicants, wholly innocent of responsibility for past discrimination, being *denied* employment in favor of blacks due to the scarcity of available positions. It is apparent that past general racial discrimination cannot justify unconstitutional present racial discrimination against white applicants. If such reverse discrimination is condoned or endorsed, a resurgence of the "us" and "them" concepts of the pre-*Brown*

1 (1971)) where whites have no right to insist upon segregated schools, blacks and whites alike may not constitutionally be denied employment opportunities because of race.

28. The Constitution does not guarantee that the effects of racial discrimination will be eliminated. It guarantees only equality of opportunity. *Hernandez* v. *Texas*, 347 U. S. 475, 482 (1954); *Gibson* v. *Mississippi*, 162 U. S. 565, 580 (1896). *Gibson* stressed the right of all persons not to be deprived from serving on a jury due to race; however, *Gibson* specifically rejected the concept of proportional racial representation. In addition, in *Swann* v. *Charlotte Mecklenberg Board of Education*, *supra*, this Court rejected any right to proportional representation.

era[29] will likely occur to the grave detriment and perhaps the destruction of the many gains now realized by Title VII and related enactments.[30] Thus, if the Government, by endorsing affirmative action programs and by viewing the Commission's testing guidelines as mandatory, succeeds in abolishing objective test scores for hiring, and instead fosters minority preference quotas, which favor blacks, the educative force of the Government's teaching that race is irrelevant in determining worth will be seriously blunted. Where the Government is heard to speak in two voices, one urging color-blindness and the other in opposition stressing that preference is justified solely because a person is a particular color or race, listeners will tend to hear only the voice they desire.[31] Too often our citizens will conclude that race is pre-eminent in securing and retaining job opportunities with individual merit having slight influence. Old antagonisms will flame anew as racial competition is exacerbated and the federal goal of equal opportunity—the only goal protected by the Constitution—may well be an unfortunate casuality.

Furthermore, by discouraging objective testing and encouraging the resort to quota hiring which clearly is intended to favor blacks, the Commission has produced a corresponding detrimental impact upon the many other minority groups that comprise our society.[32] This Court has considered this impact and

29. *Brown* v. *Board of Education*, 347 U. S. 483 (1954). This case emphasized that all racial discrimination is simply wrong and must be prohibited.

30. Flaherty and Sheard, *DeFunis, The Equal Protection Dilemma: Affirmative Action and Quotas*, 12 Duq. L. Rev. 745 (1974).

31. Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Interest*, 61 N. W. L. Rev. 363, 380 (1966); Berelson & Steiner, *Human Behavior*, 113 (1964).

32. While the Commission and affirmative action groups apparently desire to favor blacks by abolishing objective test scores for hiring or promotion, other minority groups with the exception of blacks, may well wish to preserve these objective criteria to protect

has determined that preference based upon race cannot be maintained as a constitutionally endorsed principle, is incompatible with out system of government, and would create new antagonisms in our society:

> "If petitioners [blacks] were upheld in their demand [proportional representation in employment] then other races, white, yellow, brown and red, would have equal rights to demand discriminatory hiring on a racial basis.
>
> "These considerations are most pertinent in regard to a population made up of so many diverse groups as ours . . . [T]here could be no prohibition of the pressure of picketing to secure proportional employment on ancestral grounds of Hungarians in Cleveland, of Poles in Buffalo, of Germans in Milwaukee, of Portugese in New Bedford, of Mexicans in San Antonio, of the numerous minority groups in New York, and so on through the whole gamut of racial and religious concentrations in various cities . . . The differences in cultural traditions instead of adding flavor and variety to our common citizenry might well be hardened into hostility by leave of law." *Hughes* v. *Superior Court*, 339 U. S. 460, 464 (1950).

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them from preferential treatment *in favor* of blacks. Fiss, *The Fate of an Idea Whose Time Has Come: Anti-discrimination Law in the Second Decade After Brown* v. *Board of Education*, 41 U. of Chi. L. Rev. 742, 752.

> "The history of the racial civil rights movements has been to change the law to prevent the dominant status of one race over another race and to establish an equality of legal status. This has ironically created a new intangible power still controlled by Whites in power, who are haunted by "white guilt" and seek to atone with a self-imposed restitution of the group. Fortunately for those in charge of determining the terms of the restitution, payment is to be made by *other* Whites not in power, or unable to enter the power structure because they have been told to stand aside." Flaherty and Sheard, *supra* at 766.

The authors point out that it is not the white persons who have control of the power structure who are likely to be disadvantaged by preference for blacks, but other racial and ethnic minorities and poor whites who together comprise what sociologists have described as the "underclass". See also Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—the Problem of Special Treatment, supra.*

Indeed, if benefits are to be distributed according to racial or ethnic groups, it likely will be a short time before all of our citizens will announce an ethnic identity in order to secure priorities.[33] Once preferences have been awarded according to "minority group" it is not likely that this group will voluntarily abandone its preferential position.[34] It is equally unlikely that any political administration will legislate away all granted priorities. Consequently, priorities and quotas based upon a group's racial or ethnic composition will proliferate with the inevitable result that differences in race and culture will become again the foundation for antagonism in our society—all this with the complicity of law.[35]

It has been demonstrated that the Commission's guidelines, if strictly applied—as in the decision below, will result in the abolition of even job related tests, and drive employers to use a quota system of hiring and promotion favoring blacks to avoid trouble with the Commission and lower courts. However, quotas both contravene the purpose of Title VII and are antithetical to the Constitutional guarantees of equal protection. It follows that to preserve the purpose of Title VII and the

33. Once minority preference quotas are approved in the employment field, preference in the political arena may be sought by affirmative action proponents. They may well argue that the one man one vote principle should be no more durable than color-blindness and that the black needs two votes to "catch up". Thus, sanctioning quotas in one area has lasting and far reaching ramifications in others and all such preferences undermine the constitutional precepts of our government.

34. "Once you grant people a special privilege, you can as easily take it back from them as take back meat from a tiger." Glazer and Himmelfarb, *McGovern and the Jews: A Debate*, 54 Commentary 43, 49 (September, 1972).

35. Moreover, if benefits are awarded because of race, regardless of any asserted benevolent purpose, it has been suggested that courts will soon be required to determine the race of individuals who possess mixed racial origins. Bittker. *The Case of the Checker Board Ordinance: An Experiment in Race Relations*, 71 Yale L. J. 1387, 1422 (1962).

concept of meritocracy embedded in the Civil Rights Act and the Constitution, this Court must enunciate that the Commission's testing guidelines will not be used as the inflexible standard to determine the legitimacy of an employer's testing program.

4. The Employer's Testing Procedure Comported with the Requirements of Title VII.

The principles discussed above demonstrate that the Employer's testing procedures comported fully with the requirements of Title VII. A review of the steps taken by the Employer to meet the demands of the Statute is necessary to demonstrate the validity of this contention. Prior to the effective date of Title VII the Employer began actively to recruit black applicants from the geographical employment area in order that they might participate in its apprentice program. The Employer also solicited applications for this purpose from its black employees. Consonant with the mandate of this Court in *Griggs*, the Employer utilized an acknowledged expert to determine if its testing program was job related. The expert in turn followed a manual issued by the Commission on August 1, 1970, and entitled "Guidelines of Employee Selection Procedures". The expert directed that each employee be given three tests designed to predict and reflect the employee's ability to perform his assigned task. The employee's actual job performance was then independently rated by two supervisors who did not know the employee's test scores.

Each employee's test results and job performance ratings were then transmitted to the expert for a statistical correlation. The exerpt determined:

> "Inspection of the correlations and charts shown in this report shows quite conclusively that both the Beta and Wonderlic A tests can be reasonably used for both hiring and promotion for most of the jobs in this mill. . . . The EEOC could not reasonably object to these standards in light [of] the validation data covered in this report."

The district court then found that:

> "35. The results of the validation study, presented both in statistical and graphical form, showed positive correlations of a statistically significant nature for nine of the ten specific job groupings."

Furthermore, the district court found:

> "The group tested was typical of employees in the skilled lines of progression . . . the personnel tests administered at the plant have undergone validation studies and have been proven to be job related."[36]

It is thus apparent that the Employer validated its testing procedure and related it to jobs in all lines of skilled employment, consistent with the directives of *Griggs* and Title VII, even though the testing procedure may not have passed each of the guidelines' manifold and intricate requirements.[37] At the very

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36. The district court found that the complexity of the Employer's newly installed machinery and the sophistication of the job required employees with "a high level of native intelligence." Consequently, that court found that the Wonderlic "verbal" test which measured reading ability was job related. Inasmuch as the Wonderlic searched for an indispensible job factor, it is demonstrably a reasonable measure of job performance, and cannot be declared discriminatory in this case. See, *Griggs* at 431, 436.

37. The decision below suggested that discrimination resulted from the absence of "job analysis". However, it is evident that the reasonable equivalent of "job analysis" was utilized by the Employer. Thus, when supervisors independently rated an employee's job performance, they were necessarily considering the requirements of the task with which they were unquestionably familiar.

Furthermore, the criticism of the decision below that the Employer's job analysis was subjective and therefore inadequate is unwarranted. The technique of job analysis in industrial psychology is not only undeveloped and inexact, but also is necessarily highly subjective. In the first place, the analysis of the variables that constitute a particular job depends upon the subjective views of the supervisor, researcher, or employee. Second, any hierarchy of tasks constructed after job duties are isolated also reflects subjective views. In addition, it appears from available psychological evidence that a supervisor's overall impression of an employee is a reasonable validating method; it has not been demonstrated that such an evaluation will be more subject to bias than will ratings based upon specific

least, rather than penalizing the Employer by proscribing the continued use of its testing procedure, this Court should remand this issue to the trial court so that the Employer may demonstrate that its procedure is valid consonant with the principles underlying Title VII and *Griggs*.

B. Congress Intended Trial Courts to Have Broad Discretion to Fashion Remedies in Title VII Cases to Fit the Equities of the Particular Case: The Decision Below Contravenes This Intent.

1. The Lower Court Decision that Back Pay Must Mechanically Be Accorded Severely Restricts the Proper Exercise of the Trial Court's Discretion.

Congress intended a district court hearing Title VII case to have broad discretion to determine the remedy once discrimination is found. The language of remedial Section 706(g) and the congressional commentaries endorse this contention. The unambiguous words of that section are ". . . which *may* include reinstatement or hiring of employees, with or *without* back pay. . . ."[38] (emphasis added.)

Further, Section 706(g) was patterned after the remedial provisions of the National Labor Relations Act.[39] Thus, the wording of Section 706(g) is virtually identical with that of Section 10(c) of the NLRA. Then, too, during the Senate

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behavior traits. Accordingly, to reject a job analysis, as did the court below, because it failed to quantify criteria representing work behavior demonstrates a misunderstanding of the current development of industrial psychology and of the concept of "job analysis". See Brief submitted by American Society for Personnel Administration.

38. Section 706(g) of Title VII (42 U. S. C. § 2000e-5(g)) provides in relevant part:

> "The court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay. . . ."

39. Section 10(c) of the NLRA (29 U. S. C. § 160(c)) provides for "affirmative action including reinstatement of employees with or without back pay."

debate involving Title VII, Senator Humphrey stated that the relief provisions of Title VII were modeled after those contained in the NLRA:

> "The relief sought in such a suit would be an injunction against future acts or practices of discrimination, but the court could order appropriate affirmative relief such as hiring or reinstatement of employees and the payment of back pay. This relief is similar to that available under the National Labor Relations Act." (110 Cong. Rec. 6549, 1964)

It follows, in view of the intended parallel between the remedial portions of the two Acts, that an examination of this Court's decisions concerning the Labor Board's discretion to frame remedies is instructive to determine the breadth of discretion afforded to District Courts in Title VII proceedings. In *Phelps Dodge* v. *N. L. R. B.*, 313 U. S. 177 (1941), decided under 10(c) of the NLRA, the Board had first found an unlawful discharge and had then mechanically ordered reinstatement and full back pay even though the discharged employee had not earned any wages during the period of his termination. This Court remanded the case to the Board for that agency to consider if damages should have been mitigated and stated:

> "Here again we must avoid the rigidities of an either-or rule. The remedy of back pay, it must be remembered, is entrusted to the Board's discretion; it is not mechanically compelled by the Act. And in applying its authority over back pay orders, the Board has not used stereotyped formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations." (313 U. S. at 198.)[40]

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40. Courts in Title VII cases as well as Board cases have followed the principle of mitigation of damages demonstrating the similarity of remedial precepts under the two Acts. In *Jurinko* v. *Edwin L. Wiegand Co.*, 331 F. Supp. 1184 (W. D. Pa., 1971) modified, 477 F. 2d 1038 (CA 3, 1973) a Title VII case, the court found one of two illegally discharged employees had failed to exercise due diligence to seek interim employment. Accordingly, using the earnings of

This Court reaffirmed the Labor Board's extensive powers to frame remedial orders in *N. L. R. B.* v. *Food Store Employees Union, Local 347,* ..... U. S. ..... (May, 1974), 86 LRRM 2209, when it observed: "Congress has invested the Board, not the courts, with broad discretion to order a violator 'to take such affirmative action' as will effectuate the policies of the Act." at 86 LRRM 2211.

As demonstrated, the remedial provisions of the NLRA were the model for those of Title VII. It is evident that Congress was aware that this Court accorded broad powers to the Labor Board rather than to the reviewing courts to fashion affirmative remedies under the NLRA. Thus, it is reasonable that Congress in Title VII cases chose to invest the trial court, rather than the reviewing court, with extensive discretion to determine the appropriate relief after considering the variables of a particular case.

It is antithetical to this liberal investment to permit a reviewing tribunal in Title VII matters to severely restrict the circumstances under which a district court may opt to deny back pay and to instead require that back pay be granted mechanically whenever unlawful discrimination is shown. Moreover, this Court's construction of another statute, which like Title VII provided equitable relief, supports according to the trial court untrammelled discretion to fashion remedies in Title VII cases. In *Hecht* v. *Bowles,* 321 U. S. 321 (1944), this Court upheld a denial of injunctive relief despite the Emergency Price Control Act of 1942 which directed that this relief "shall be granted . . ." This Court's observations in *Hecht* are equally applicable here:

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the employee who had found work as a guide, the court reduced the monetary award granted to the employee who did not seek work. In *McLaughlin* v. *Mercury Freight Lines, Inc.,* 5 F. E. P. Cases 769 (S. D. Ala., 1972), aff'd. 472 F. 2d 1406 (CA 5, 1973), a Title VII case, the court considered an employee who had resigned his interim work for an unjustified reason and deducted earnings as if he remained employed.

> "The essence of equity jurisdiction has been the power of the Chancellor to do equity and mold each decree to the necessities of the particular case . . . equity [is] the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims . . . If Congress [had] desired to make such an abrupt departure from traditional equity practice . . . it would have made its desire plain." (at 329-330.)

Since in *Hecht*, this Court held that discretion resided in the trial court regardless of the mandatory language of the statute, it follows that under the *permissive* wording of Section 706(g) unimpeded discretion to mold remedies to the necessities of each case must reside in the trial judge.

It is within this framework that the decision below must be examined. The court below held that a successful plaintiff should ordinarily be entitled to back pay, and that when an injunction is granted, back pay must follow. (474 F. 2d at 140-141.)[41] The court below strongly suggested that an employer's reliance on a state statute allegedly conflicting with the mandate of Title VII would constitute the only special circumstance justifying the denial of an award of back pay. (474 F. 2d at 142, n. 5.) Accordingly, the rule expounded by the decision below virtually nullifies the circumstances under which a trial judge may deny back pay and in contravention with the design of Title VII, renders the trial court's discretionary power nugatory.[42]

It follows that the order below concerning back pay must be reversed so that Congress's intent to grant broad discretionary powers to trial courts may be effectuated.

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41. *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F. 2d 1364, 1376, n. 35, has so interpreted the decision below.

42. *Kober* v. *Westinghouse Electric Corporation*, 480 F. 2d 240, 247 (1973).

2. The Decision of the Court Below Was Based Upon a Fallacious Analogy Between an Award of Attorney's Fees and a Grant of Back Pay.

The court below determined that back pay is to be awarded to a successful plaintiff as of course by erroneously extending this Court's holding in *Newman* v. *Piggie Park Enterprises*, 390 U. S. 400, 402-403 (1968), concerning the awarding of attorney's fees, to embrace the grant of monetary relief. (474 F. 2d at 142.) Thus, *Newman* held that attorney's fees should generally be granted to successful plaintiffs who bring an action under Title II against a manager of public accommodations, since the plaintiff in instituting the action is acting as a "private attorney general" and vindicating the public interest. While the same rationale may warrant allowing attorney's fees to successful plaintiffs in Title VII actions,[43] this reason does not support awarding back pay as of course. In endorsing a mechanical award of attorney's fees and thereby approving a significant restriction of the trial court's discretion, this Court recognized that the *initiation* of Civil Rights suits advances the commonweal. This public purpose is satisfied when the suit is brought regardless of the individual factual patterns or equities of a particular case, and attorney's fees represent an acknowledge-

43. The statutory provisions concerning allowing attorney's fees in Title II and Title VII actions are virtually identical:

Title II, 42 U. S. C. § 2000a-3(b):

"(b) In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person."

Title VII, 42 U. S. C. § 2000e-5(k):

"(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."

ment of the plaintiff's concern for the public's interest.[44] Back pay, however, stands on a different footing. This type of monetary award is designated to afford compensatory relief for private, not public, inequities.[45] Accordingly, the often unique facts of the case under consideration, including the employer's good faith, and an employee's failure to pursue promotional opportunities or his lack of qualifications must be examined to determine if back pay is appropriate. Apparently recognizing that diverse and complicated situations exist in Title VII cases, Congress determined to avoid the rigidities of an either-or rule in the area of back pay.[46]. Therefore, the decision to grant or deny this award was entrusted to the trial court as the tribunal in the best position to properly evaluate all the relevant factors in a particular case. As the Eighth Circuit observed:

> *"We must keep in mind that the discretion is to be exercised by the district court and not by a court of review. This court should not substitute its discretion for that of the district court."* (emphasis added.)[47]

The teaching of the Eighth circuit is appropriate to problems in this case, as the following illustration demonstrates. In *United States, et al.* v. *United States Steel, et al.* a district judge considered alleged discrimination at a major steel works in Fairfield Alabama.[48] Exercising his discretion, he determined to grant back pay to some classes and to deny it to others. To mold

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44. *Developments—Title VII, supra,* at 1254.

45. Thus, an individual's interim earnings are set off against any award of back pay to him. See note 39, *supra.*

46. Congress granted broad discretion to the District Court to fashion remedies in Title VII cases as the equities of the particular case compel. *Le Blanc* v. *Southern Bell Tel. & Tel. Co.,* 460 F. 2d 1228 (CA 5, 1972), *cert. den.,* 400 U. S. 990 (1972). (District Court did not err in refusing to grant back pay to plaintiffs.)

47. *Larson* v. *United States,* 296 F. 2d 167, 170 (CA 8, 1961); See, *N. L. R. B.* v. *Food Store Employees Union, Local 347, supra.*

48. 371 F. Supp. 1045 (N. D. Ala., 1973). This case involved 12,000 employees, and included 10,000 pages of exhibits.

relief to fit the necessities of the particular cause before him, the judge examined the many variables involved in that consolidated proceeding. Thus, among other factors, the judge considered the employer's available job opportunities for all employees at the Fairfield works. Relevant to this analysis was the ever increasing impact of automation together with the area's economic conditions. In addition, the trial court examined the qualifications of minority employees to fill the available positions. Moreover, the trial judge in framing an equitable remedy balanced the employer's voluntary attempt to comply with the directives of the Civil Rights Act by opening promotion opportunities to every employee regardless of race. Furthermore, he considered the fact that significant numbers of minority group members voluntarily elected to refuse nondiscriminatory opportunities to secure available promotions. These and other factors convinced the trial judge that back pay and other monetary relief should be denied to certain classes of minority employees. On the other hand, had the special circumstances rule decreed by the court below been in effect, the trial court would have had no occasion to analyze or even review the relevance of these variables since it would have been required to award back pay to all classes, regardless of these factors, in tandum with any injunctive relief. It is apparent that Congress intended the variables examined by the trial court to be considered in Title VII cases; the repeated use of the word "may" in Section 706(g) eloquently establishes this intention.

The court below did not find that the District Court abused its discretion. Rather the decision below transmogrified the discretionary powers of a trial court into a mirage by holding that a "district court *must* exercise its discretion as to back pay in the *same manner* as it exercises discretion as to the attorney fees under Title II of the Civil Rights Act." 474 F. 2d at 142. (Emphasis added.) In so holding the decision below has misread Congress's intentions in the area of back pay and therefore must not be countenanced by the Court.

3. The Equitable Philosophy of Title VII's Remedial Provisions Requires that a Balance Be Struck to Accommodate the Interests of All Parties.

This Court has observed that the remedial provisions of Title VII are equitable in concept. See, *Curtis* v. *Loether*, ... U. S. ....., 94 S. Ct. 1005, 1009-10 (1974). In order to foster the equitable nature of these remedial provisions, the amicus suggests that this Court enunciate certain guiding principles for the Commission and lower courts to follow. While Courts of Appeals have authorized awards of back pay for an entire class found to be a victim of employment discrimination and have then permitted this award to be allocated among the class members regardless of individual financial loss, the Chamber contends that these decisions are contrary to the remedial intent of Title VII.[49] As has been established, Title VII's remedial provisions are analogous to those of the National Labor Relations Act. Thus, consistent with the instruction of the Labor Act, a finding of class discrimination is not itself a proper premise for determining that any individual class member is to be awarded compensatory relief. Back pay or related compensation must be limited to those persons suffering actual damage. There should be a separate determination on an individual basis as to who is entitled to recover compensation and the amount of this recovery. To determine if a particular class member merits compensatory relief, complex factors must be evaluated. These variables include job availability, the employee's qualifications for the available job opportunity, and voluntary rejection of promotion chances and of course interim earnings. Individual circumstances will vary and not all members of the class will automatically be entitled to any recovery or the same amount of recovery. Consequently, damage awards must be individualized so that the constitutional problems which would arise, in taking property from an employer to give to another without a showing of loss to the recipient

49. *Pettway* v. *American Cast Iron Pipe Co.*, *supra*, at 267.

will be avoided.[50] In short, this Court should specifically articulate that back pay awards for a class are inconsistent with the remedial concept of Title VII, that class discrimination does not necessarily mean that every class member is entitled to back pay, and that back pay awards must be granted only to those persons who have suffered actual monetary loss.

Independently of but consistent with the foregoing, there must be some meaningful control over the class itself.[51] Courts should be instructed to limit class size by including in a class only individuals who have actually applied for *available* job openings, particularly where the employer, during the relevant time period, has been conducting his operations in good faith compliance with the Civil Rights Act and related enactments.[52] The conceivable alternative would be to include every minority member in the geographical hiring area in the affected class merely because they *might* have sought available employment opportunities. However, this inclusion would be totally at odds with determining damages on an individual basis as mandated by the remedial provisions of Title VII and the NLRA from which these provisions were copied. That is, many members of a class embracing an entire hiring area could not begin to assert actual damages. Therefore, unless this Court is prepared to permit monetary relief to be awarded in a lump sum to the class and then allocated to class members regardless of individual harm, it should not permit the class to exceed those who may reasonably expect to be compensated.

Moreover, massive class awards allocated to virtually unlimited class members regardless of individual harm are not only

50. *Pettway* v. *American Cast Iron Pipe Co., supra,* concurring opinion of Bell, C. J. at page 267.

51. The rationale of this Court in *Eisen* v. *Carlisle & Jacquelin,* 94 S. Ct. 2140 (1974) partly turned upon the need to judicially manage class size so as to avoid a "Frankenstein monster posing as a class action," at 2148.

52. *Thornton* v. *East Texas Motor Freight,* 497 F. 2d 416 (CA 6, 1974).

antithetical to the remedial purpose of Title VII but also will have a devastating impact on the economic well being of employers. If this Court were to sanction such awards being made against employers, particularly those who are attempting to comply with equal opportunity policy, many employers will simply be forced to shut their doors to the detriment of blacks, whites and the commonweal. There are alternatives to huge back pay awards and these should be fully explored by trial courts. For example, where an employer is recruiting and hiring increasing numbers of blacks (without resorting to "reverse discrimination"), instituting programs designed to assist blacks in overcoming educational disadvantages and publicizing its equal opportunity policy, a court could well encourage these efforts by requiring no monetary penalty and retaining jurisdiction for a reasonable period of time to insure continued implementation of these statutory policies.[53]

Furthermore the philosophy underlying Title VII strongly suggests that the heart of this statute is to insure that members of minority groups will obtain and then retain job and promotion opportunities. Upward mobility, rather than back pay is the prime concern of Title VII. Consequently, the amicus suggests that, similar to proceedings before the Labor Board, a trial court should have discretion to order a procedure of two hearings in order to actually facilitate the realization of the

53. See, *Parham* v. *Southwestern Bell Telephone Co.*, 433 F. 2d 421 (CA 8, 1970).

Under the Act, when an employer is charged with a Title VII violation, his potential liability for back pay extends backward two years prior to the date the charge is filed with the Commission. (Section 706g). If during this two year period, the employer has earnestly attempted to comply with Title VII by instituting programs similar to those begun in *Parham*, a trial court should have discretion to either totally expunge his liability for back pay or to decree that it should not accrue after the date these programs were first implemented. In this way even if the employer had in the past violated Title VII, his good faith efforts to comply with its requirements are encouraged by the elimination or reduction of back pay liability. cf *Local Lodge No. 1424 I. A. M. (Bryan Mfg. Co.)* v. *N. L. R. B.*, 362 U. S. 411; see text to note 28, *supra*.

paramount purpose of Title VII. That is, the first hearing would determine liability; the second, if necessary, would compute the amount of back pay when that remedy is directed. This is similar to Labor Board procedures where a hearing on the merits of the case is held and remedy not considered. Only if monetary liability is established and the parties do not voluntarily settle on the extent of this remedy, is a second "back pay" hearing held.[54]

Very likely the second hearing will be unnecessary. Following a determination of liability, the parties, employer and minority group employees who must live together in order to function as a productive entity, will most probably themselves resolve the issues concerning remedy. Thus, an employer found to have violated Title VII will likely meet with representatives of the affected minority to determine the mechanism of restitution. Inasmuch as the parties must coexist and to preserve public image, an offending employer will wisely and promptly restructure his operations so that minority group members will have an equal opportunity for jobs and upward mobility. Monetary relief also will be trailored by the parties to not only fit the needs of the employees involved, but to insure that a healthy employing entity will remain. Thus, rather than considering back pay, the parties, including the employer, employees, government, and union, may resolve that an employer financed training program is more suited to the needs of the particular employees involved so that upward progression will be facilitated. (See *Wells* v. *Bank of America* (N. D. Cal. 1973 unreported).) Moreover, the employees' union representative, as a partner to any settlement, will be strengthened as a result of its part in securing a voluntary accord. In short, the voluntary agreement reached will meet the needs of the parties involved and therefore will be more durable and willingly obeyed. The likelihood of a

54. It has been estimated that back pay calculations for only 371 class members would require over four years. *Bryan* v. *Pittsburgh Plate Glass Co.*, 5 FEP 616 (W. D. Pa. 1973).

second trial to establish the extent of back pay is slight once liability is determined.

Conversely, a rule affording back pay to successful plaintiffs as of course will entitle the defendant employer to jury trial. A trial by jury will delay the expeditious resolution of Title VII proceedings to the detriment of plaintiffs and the commonweal alike.[55] While some authorities have urged that defendants should be granted jury trials pursuant to the Seventh Amendment of the Constitution when plaintiffs seek back pay in Title VII cases,[56] most courts have deprived employers of a trial by jury. These courts have justified denying a jury trial by relying on the fact that back pay is an integral part of an equitable remedy, a form of restitution, with the decision whether to award this relief committed to the discretion of the trial judge.[57] Inasmuch as there appears to be valid arguments to support preserving jury trial in Title VII cases since the back pay remedy is the equivalent of damages at common law for wrongful discharge,[58] deprivation of trial by jury can be justified—if at all—only so long as the discretion of the trial court is untrammelled by restrictions such as those imposed by the court below.[59] It follows that where a district court's discretion is

55. Delay due to jury trial was recognized by this Court in *Curtis* v. *Loether*, ... U. S. ....., 94 S. Ct. 1005 (1974). In *Curtis* this Court held that the Seventh Amendment of the Constitution entitles a party to a jury trial in actions brought pursuant to Title VIII, the fair housing provisions of the Civil Rights Act, since a trial court had no discretion to deny monetary relief when discrimination was shown.

56. *Ochoa* v. *American Oil Company*, 338 F. Supp. 914 (S. D. Tex., 1972).

57. *Curtis* v. *Loether, supra*, at 1010. In *Curtis*, this Court did not express any view on the merits of denying a jury trial in Title VII cases.

58. *St. Clair* v. *Local Union No. 515*, 442 F. 2d 128, 132 (CA 6, 1969).

59. In *Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500 (1959), this Court observed the right of a jury trial must whenever possible be preserved. See *Developments—Title VII, supra*, 1265. It has been

severely circumscribed—as mandated by the decision below—and back pay is to be awarded as of course, a jury trial may well be required by the Seventh Amendment. That is, if the rule of the court below is to be followed, a plaintiff proving unlawful discharge under Title VII will be mechanically entitled to an award of back pay since employers will not now be able to claim that their discriminatory action was based upon state law. Accordingly, in Title VII cases, just as in Title VIII matters, the trial court will have no discretion to deny monetary relief; this Court's rationale that jury trials are required in Title VIII cases will apply equally to proceedings arising under Title VII, and expeditious resolution of these proceedings will be foreclosed.

CONCLUSION.

For the foregoing reasons and those advanced by the Employer, it is respectfully urged that this Court issue a decision consistent with the positions advanced by the Chamber.

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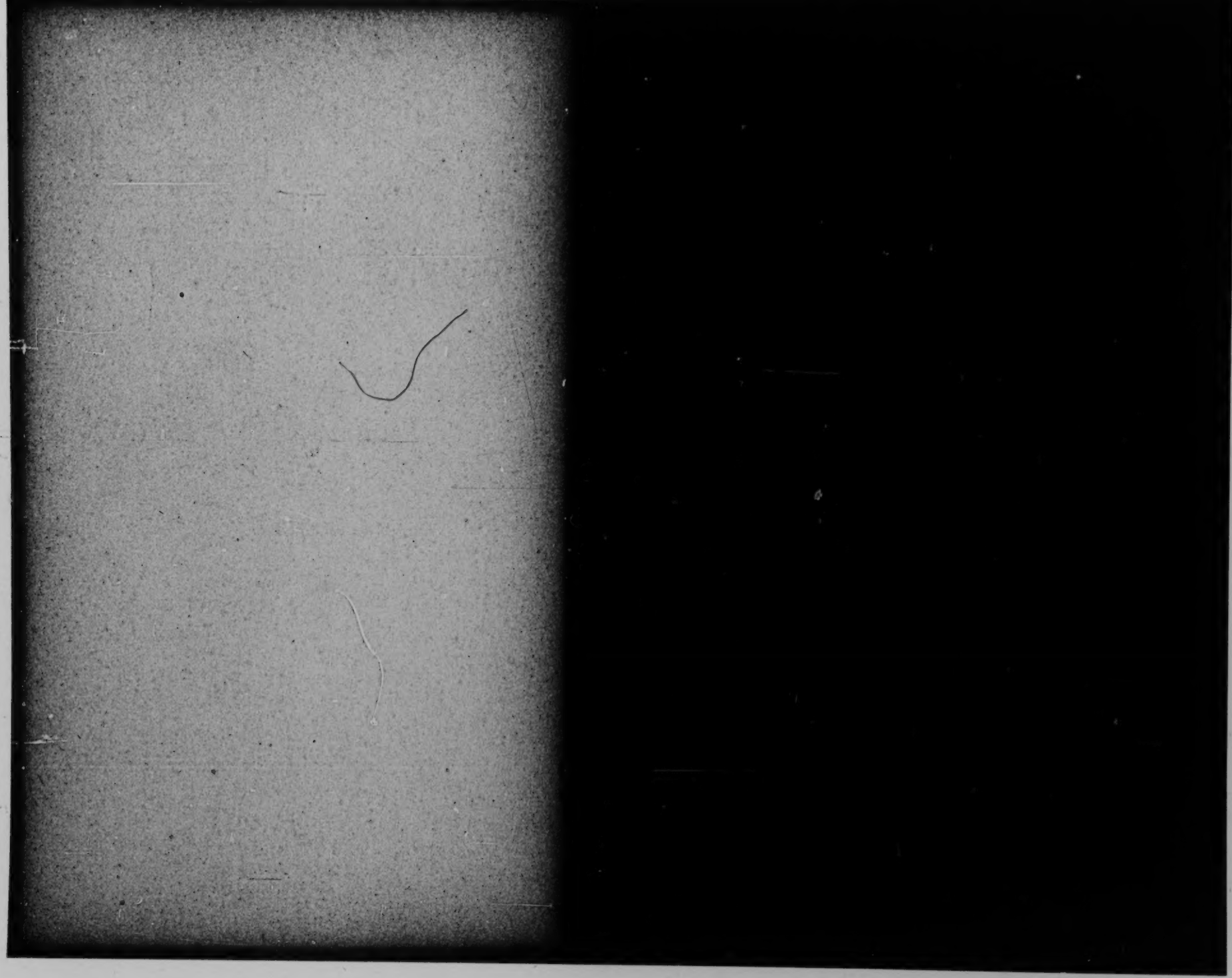
stated that the presence of an equitable claim for injunctive relief with the back pay claim should not operate to deprive an employer of a jury trial. *Ochoa* v. *American Oil Company, supra,* at 921; see *Curtis* v. *Loether, supra,* at 1009, note 11.



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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-389

ALBEMARLE PAPER COMPANY, et al.,

Petitioners,

v.

JOSEPH P. MOODY, et al.,

Respondents.

No. 74-428

HALIFAX LOCAL NO. 425,
UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO,

Petitioners,

v.

JOSEPH P. MOODY, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law hereby moves, pursuant to Rule 42(2) of the Rules of this Court, for leave to file the attached brief as *amicus curiae*. The petitioners have refused their consent to the filing of this brief. Respondents have consented to its filing.

As more fully set forth in the brief (at 2, *infra*), the Committee has entered into a contract with the Equal Employment Opportunity Commission, under which the Committee is responsible for providing legal services to those who seek relief from employment discrimination. Moreover, the Committee is otherwise significantly involved in the national effort to eliminate discrimination and its effects from public and private employment. The questions presented in this case as to the appropriate standards for awarding back pay under Title VII of the Civil Rights Act of 1964 are of immediate and vital concern to the Committee and those to whom it provides legal assistance. The positions taken by petitioners involve remedial policies of general applicability to civil rights litigation. The implications of those positions may not be fully briefed by the immediate litigants, and yet may have direct and important consequences for the disposition of numerous other cases.

Respectfully submitted,

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BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE*

INTEREST OF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law was organized in June 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure equal civil rights for all Americans through the legal process. The Committee's membership includes three former Attorneys General, thirteen past Presidents

of the American Bar Association, two former Solicitors General, a number of law school deans, and many of the nation's leading lawyers. Pursuant to a contract with the Equal Employment Opportunity Commission, the Lawyers' Committee has since 1971 assisted the private bar in five cities in litigation under Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§2000e *et seq.*), on behalf of injured individuals and class members unable to secure relief through the EEOC. In addition, the Lawyers' Committee, its Government Employment Project, its local committees, affiliates, and volunteer lawyers are actively engaged in providing legal representation to the victims of racially discriminatory employment practices in a wide range of other cases. *E.g., Morrow v. Crisler*, 491 F.2d 1053 (5th Cir.), *cert. denied*, ___U.S.___ (1974); *Carr v. Conoco Plastics*, 432 F.2d 57 (5th Cir.), *cert. denied*, 400 U.S. 951 (1970); *Young v. International Telephone & Telegraph Co.*, 438 F.2d 757 (3d Cir. 1971); *Douglas v. Hampton*, ___F.2d___, No. 72-1376 (D.C. Cir., Feb. 27, 1975).

Amicus is troubled by the position advanced in this case by the Company and Union petitioners as to the circumstances under which district courts should award back pay to minority citizens to reimburse them for wages lost as a result of racially discriminatory practices.[1] The clear import of petitioners' argument regard-

[1] This case also involves an issue as to the validity of ability testing devices utilized by the Company petitioners for employment and job assignment purposes. Our review of the record convinces us that the Court is not likely to accept the invitation of the Company and an *amicus* to withdraw from the landmark decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). We therefore confine this brief to the back-pay questions, on which the Court has not previously spoken.

ing the back-pay issue—that the back-pay standard adopted by the Court of Appeals is in conflict with the "traditional equitable discretion" accorded district courts with respect to matters of relief—is that the remedial powers of federal district courts, when exercised in a manner which accords less than complete relief, are not subject to appellate intervention except upon a finding that the district court has grossly abused its discretion. Petitioners argue that since the back-pay provision of Title VII, 42 U.S.C. §200e-5(g), was designed to invest district judges with "traditional equitable discretion," it necessarily follows that an appellate guideline which requires full relief in the absence of injustice to the losing party is an impermissible encroachment upon the trial court's authority.

Petitioners' position is without merit. It is directly contrary to the established remedial principle that, unless there are compelling circumstances amounting to manifest injustice to the wrongdoer, legal wrongs do not go without a complete remedy. Petitioners' argument is also inconsistent with Congress' purposes in adopting Title VII. If petitioners' contentions were sustained, the national effort to eradicate racial discrimination in employment would be impeded. This brief is filed by the Committee as a friend of the Court to urge affirmance of the opinion and decision below. Strong considerations of national policy demand that this Court adhere to a standard of "complete justice" to govern the award of back pay in employment discrimination cases.[1]

STATEMENT OF THE CASE

In this Title VII class action the District Court held that the Company and Union petitioners had engaged and were engaging in racially discriminatory employment practices that have consigned black workers to less-desirable, lower-paying jobs, and assured white employees more desirable and better-paying jobs. (A. 474-507.) Despite the wages concededly lost by the black victims as a result of petitioners' discriminatory practices, the District Court refused to make them whole through an award of back pay.[2] The court offered two reasons for this anomalous result: first, it held that petitioners' racial employment practices were not the product of subjective "bad faith"; and second, it speculated that petitioners "might have chosen to exercise unusual zeal in having this [district] court determine their rights . . ." had they known of the back-pay claim earlier than a year prior to trial. (A. 498.)

The Court of Appeals reversed the trial court's refusal to award back pay. It held that the innocent victims of unlawful employment discrimination "should ordinarily be awarded back pay unless special circumstances would render such an award unjust" (A. 523-24), but admonished that "a back pay award is limited to damages which are actually suffered." (A. 524.)

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[2] Section 706(g) of Title VII, 42 U.S.C. §2000e-5(g), which authorizes the back-pay remedy, reads in relevant part as follows:

> If the court finds that the respondent has engaged in or is intentionally engaging in an unlawful employment practice . . . the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative relief as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay . . . .

SUMMARY OF ARGUMENT

This case involves important public and congressional policies relating to the elimination of racial discrimination. The resolution of this case may substantially influence the effectiveness with which Congress' policies regarding employment discrimination may henceforth be implemented. Unless the principles applied by the Court of Appeals are adhered to by this Court, the strong national policies against employment discrimination may be impeded and frustrated.

Well-established legal and equitable principles require that one who suffers unlawful injury should be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed, unless there is a clear and valid legislative command requiring a less complete remedy. Accordingly, even without the authorization of back pay contained in Section 706(g) of Title VII, federal law imposes a "complete relief" standard.

Nothing in the language of Title VII or in its legislative history indicates that Congress intended the victims of employment discrimination to be made less than whole. To the contrary, the background of Title VII, including congressional awareness of administrative and judicial implementation of other labor legislation, demonstrates that Congress expected the courts to accord each such victim a full measure of relief.

A judicial standard requiring back pay to be awarded in the absence of injustice is essential for the achievement of the purposes of Title VII. If there are "special circumstances" in which back pay need not be awarded, such circumstances must be narrowly confined and carefully defined.

ARGUMENT

I.

THIS CASE INVOLVES PUBLIC POLICIES OF THE HIGHEST PRIORITY.

In the post-*Brown*[3] era this nation, by conscious legislative and judicial decision, has rededicated itself to the goals of the Reconstruction Amendments to the Constitution. We have pledged to wipe out segregated schooling and its deleterious effects.[4] We have enjoined the maintenance of racially separate municipal parks and recreational facilities,[5] as well as racial discrimination in public accommodations.[6] We have taken major steps to ensure access to the political process free of race-based stumbling blocks.[7] We have decreed for black citizens "the freedom to buy whatever a white man can buy, the right to live wherever a white man can live."[8] And, with particular relevance to this case, we have demanded the elimination of racial discrimination in the terms and conditions of public and private employment.[9] As Judge Tuttle has said:

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[3] *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

[4] *Brown v. Board of Educ., supra.*

[5] *Watson v. City of Memphis*, 373 U.S. 526 (1963).

[6] Title II of the Civil Rights Act of 1964, 42 U.S.C. §§2000a *et seq.*; *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

[7] Voting Rights Act of 1965, 42 U.S.C. §§1971 *et seq.*; *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *White v. Regester*, 412 U.S. 755 (1973).

[8] *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443 (1968); Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§3601 *et seq.*

[9] Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §§2000e *et seq.*; *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

> Racial discrimination in employment is one of the most deplorable forms of discrimination known to our society, for it deals not with just an individual's sharing in the "outer benefits" of being an American citizen, but rather the ability to provide decently for one's family in a job or profession for which he qualifies and chooses. *Culpepper v. Reynolds Metals Co.*, 421 F.2d 888, 891 (5th Cir. 1970).

Petitioners' effort to describe this case as one unrelated to the public interest is obviously without foundation. Company Brief at 55. The Court of Appeals' directive that back pay should be awarded is not in any sense a windfall to respondents and their class. Those black citizens who have suffered diminished opportunities as a result of racial discrimination cannot obtain adequate restitution from a decree that belatedly permits them merely to transfer or move into a job for which they have long been qualified. Such relief is, to be sure, a necessary and long-overdue ingredient of an effective remedy, but it is nonetheless plainly inadequate. The public interest is not well served if the black victims of employment discrimination, who have been deprived of "the freedom to buy whatever a white man can buy," are not awarded the full economic benefits which they have lost solely because of their race. Urgent national policies are at the heart of the back-pay issue.

II.

EVEN IF CONGRESS HAD BEEN SILENT ON THE QUESTION OF REMEDIES, WELL-ESTABLISHED PRINCIPLES REQUIRE THAT THE VICTIMS OF EMPLOYMENT DISCRIMINATION BE RESTORED TO THE POSITION THEY WOULD HAVE OCCUPIED HAD THE WRONG NOT BEEN COMMITTED.

A. Equitable Discretion Must be Affirmatively Exercised to Provide Complete Relief for Wrongs Committed.

Equity came into existence "as an ameliorating system of justice"[10] in response to "the omissions of the common law, the injustice of many of its rules, and its inability from its modes of procedure, to grant the variety of remedies adequate to the wants of society and the demands of justice. . . ." 1 Pomeroy, *Equity Jurisprudence* §62 (3d ed. 1905). *See generally* F. Maitland, *Equity* 1-11 (2d ed. 1936). Equity's principal purpose was to expand the arsenal of remedies available to rectify the most difficult and complex wrongs. Similarly, from the earliest days of the Republic, the law has sought to provide fair and adequate remedies to those who have suffered unlawful injury. As Chief Justice Marshall declared in *Marbury v. Madison*, 1 Cranch 137, 163 (1803):

> The very essence of civil liberty certainly consists of the right of every individual to claim the protection of the laws, wherever he receives an injury. . . .
>
> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high

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[10] *United States v. Morgan*, 307 U.S. 183, 191 (1939) (Stone, J.).

> appellation, if the laws furnish no remedy for the violation of a vested legal right.

This Court has since consistently held that

> where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done. *Bell v. Hood*, 327 U.S. 678, 684 (1946).

Although the principle of "complete relief" is frequently cast in terms of equitable discretion, this Court's decisions make clear that, "at least absent congressional restrictions, the scope of equitable remedial powers is to be determined according to the distinctive historical traditions of equity as an institution."[11] In a wide variety of situations unrelated to racial discrimination, this Court has sought to provide full and effective remedies for violations of constitutionally and congressionally declared rights, even where the applicable statutes simply confer general discretion to provide relief, are silent as to personal remedies, or are silent even as to the existence of private causes of action. *See, e.g., Bivens v. Six Unknown Named Agents, supra; J. I. Case Co. v. Borak*, 377 U.S. 426 (1964); *Mitchell v. De Mario Jewelry*, 361 U.S. 288 (1960); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957); *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946); *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515 (1937). *Cf. Moragne v. States Marine Lines*, 397 U.S. 375 (1970).

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[11] *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 404 (1971) (Harlan, J. concurring).

Underlying these and similar decisions[12] is a strong desire "to accord full justice to all the real parties in interest. . . ." *Porter v. Warner Holding Co., supra*, 328 U.S. at 398. Where a congressional policy or the public interest is involved, discretion must be exercised in a manner that fulfills the relevant policy or interest, for "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." *J. I. Case Co. v. Borak, supra*, 377 U.S. at 428. *See also Mitchell v. De Mario Jewelry, supra*, 361 U.S. at 291-92; *Textile Workers Union v. Lincoln Mills, supra*, 353 U.S. at 457; *Porter v. Warner Holding Co., supra*, 328 U.S. at 398; *Hecht Co. v. Bowles*, 321 U.S. 321, 331 (1944); *United States v. Morgan*, 397 U.S. 183 (1939); *Virginian Ry. Co. v. System Federation No. 40, supra*, 300 U.S. at 552.

It is clear that "traditional equitable discretion" means a duty to provide total relief in accordance with the nature of the wrong and the public policies to be served. The flexibility inherent in equity is designed to permit the courts to make the injured party whole, not just half whole.[13] Relief must be complete, timely and effective. In

[12] Although some of the decisions referred to authorize legal as opposed to equitable remedies, their rationale is not meaningfully different from that which supports those cases more clearly of an equitable nature. As described by Justice Harlan, concurring, in *Bivens, supra*,

> The notion of "implying" a remedy, therefore, as applied to cases like *Borak*, can only refer to a process whereby the federal judiciary exercises a choice among *traditionally available* judicial remedies according to reasons related to the substantive social policy embodied in an act of positive law. 403 U.S. at 402 n.4 (emphasis in original). *See also id.* at 405-406.

[13] Indeed, with the merger of law and equity in the federal system in 1938, federal district courts, in striving for complete justice, are empowered to grant both legal and equitable remedies. *See* note 12, *supra*. *Compare Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944) *with Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210 (1944).

antitrust litigation, for example, relief is adequate only if it restores the situation as nearly as possible to that which would have existed but for the unlawful conduct. "The relief . . . must be 'effective to redress the violations' and 'to restore competition.' " *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972). While trial courts in such cases "are invested with large discretion to model their judgments to fit the exigencies of the particular case,"[14] they have "the duty to compel action . . . that will, so far as practicable, cure the ill effects of the illegal conduct. . . ." *United States v. United States Gypsum Co.* 340 U.S. 76, 88 (1950).[15] *See also United States v. Du Pont & Co.*, 366 U.S. 316 (1961).

The application of these principles has not been limited to antitrust cases. Any contention that appellate courts are without power to designate both the direction and the extent of the trial court's discretion is without foundation. In a wide variety of situations, this Court has not hesitated to define the limits within which district courts must exercise their discretion. In *Mitchell v. DeMario Jewelry, supra*, for example, the Court concluded:

> because of what we have found to be the statutory purposes there is doubtless little room for the

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[14] *International Salt Co. v. United States*, 332 U.S. 392, 401-02 (1947).

[15] With regard to the trial court's discretion, the Court said that "we have never treated that power as one of discretion, subject only to reversal for gross abuse. Rather we have felt an obligation to intervene in this most significant phase of the case when we concluded there were inappropriate provisions in the decree." 340 U.S. at 89.

> exercise of discretion not to order reimbursement. . . . 361 U.S. at 296.[16]

The Court merely does its duty when it provides such guidelines. Appellate guidance is required by, and is not hostile to, the discretion defined in such cases as *Langnes v. Green*, 282 U.S. 531 (1931), and *Hecht Co. v. Bowles, supra.*

This Court has closely scrutinized any claim that the victims of unlawful conduct should not be restored to the position they would have otherwise occupied. For example, the Court has directed that "if necessary, persons not originally connected with the litigation may be brought before the court so that their rights in the subject matter may be determined and enforced," *Porter v. Warner Holding Co., supra*, 328 U.S. at 398, and it has refused to deny relief because of the difficulties in ascertaining the value of the injuries or the exact extent of appropriate relief. *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.* 282 U.S. 555, 563 (1931). The Court has unequivocally refused to limit the available remedies "to prospective relief." *J. I. Case Co. v. Borak, supra*, 377 U.S. at 434. Instead, it has followed the principle announced by Justice Cardozo:

> Once let it be ascertained that the amount is determinable, and all that follows is an incident. . . . [O]nce a wrong is brought to light[,] [t]here can be no stopping after that until justice has been done.

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[16] This Court in *Mitchell* rejected an argument similar to that advanced by petitioners here:

> Respondents cannot be heard to assert that wages are ordered to be paid for services which were not performed, for it was the employer's own unlawful conduct which deprived the employees of the opportunity to render services. 361 U.S. at 293.

Bemis Bros. Bag Co. v. United States, 289 U.S. 28, 35-36 (1933).

In short,

> The general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed. *Wicker v. Hoppock*, 6 Wall. (U.S.) 94, 98 (1867).

This "general rule" must govern this and other employment discrimination cases, unless there are compelling reasons for a contrary result, or unless there is "a clear and valid legislative command"[17] requiring only partial vindication of the rights involved.

B. The "Complete Justice" Principle Is Equally Applicable in Race Discrimination Cases.

In *Steele v. Louisville & Nashville R.R. Co., supra.*, this Court inferred from the Railway Labor Act both a right of black employees to be free of racial discrimination in the collective bargaining process and an equitable remedy which federal courts have the "duty to give in cases in which they have jurisdiction." *Id.* at 207. At the same time, the Court inferred a right to relief in the form of money damages. *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210 (1944).

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[17] *Porter v. Warner Holding Co., supra*, 328 U.S. at 398. Similarly, the Court has emphasized that:

> Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." Brown v. Swann, 10 Pet. (U.S.) 497, 403 (1836) *Id.*

Even in remedying the seemingly intractable problems relating to racial segregation in the public schools,[18] the Court has followed the same rule – that the goal "of a district court's equitable powers [is] to remedy past wrongs. . . ." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971). "As with any equity case, the nature of the violation determines the scope of the remedy." *Id.* at 16.[19]

This Court has been equally concerned to insure complete justice in connection with less complex forms of racial discrimination. In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), a case involving private housing

[18] As it has turned out, the tangible aspects of segregated schooling (e.g., racially identifiable schools) have generally not proved to be intractable. But the imperceptible human harm occasioned by racial discrimination (in employment as well as in education) is not readily susceptible to immediate judicial cure. This is a necessarily tolerated imperfection in the law's remedial capacity. What cannot be tolerated, however, is the failure to rectify promptly the relatively obvious results of disparate treatment, such as unequal job assignments and lost wages. Such relief is fairly simple compared, for example, to the complex problems of restoring a competitive economic market that would have existed but for antitrust violations. Although the Company petitioner appears to suggest that back pay is so difficult to compute that the federal courts should not be imposed upon for such relief (Company Brief at 59), the Union readily concedes that "the Federal district court bench has for many years been engaged in fashioning remedies for infringement of legal rights in a variety of complex fields, so that the ramifications of Title VII actions are hardly so exceptional as to strain its capacity." (Union Brief at 26).

[19] *See also Wright v. Council of the City of Emporia*, 407 451, 463 (1972) ("a court supervising the process of desegregation [must] exercise its remedial discretion responsibly" in light of the established objective); *Davis v. Board of School Comm'rs*, 402 U.S. 33, 37 (1971) ("The measure of any desegregation plan is its effectiveness"); *Green v. County School Bd.*, 391 U.S. 430, 438 (1968) (a district court's discretion must be exercised so as to result in school systems "in which racial discrimination would be eliminated root and branch").

discrimination made unlawful by the Civil Rights Act of 1866, the Court said:

> The fact that 42 U.S.C. §1982 is couched in declaratory terms and provides no explicit method of enforcement does not, of course, prevent a federal court from fashioning an effective remedy. *Id.* at 414, n. 13.[20]

Similarly, in a voting rights case, the Court has emphasized that complete justice is the objective:

> We bear in mind that the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future. *Louisiana v. United States*, 380 U.S. 145, 154 (1965).

Finally, even where Congress has spoken on the question of relief in traditional discretionary terms, this Court has required the district courts to exercise their discretion in such a manner as to grant, rather than to withhold, the authorized relief. Thus, in construing Section 204(b) of Title II of the Civil Rights Act of 1964, under which "the court, in its discretion, may allow the prevailing party . . . a reasonable attorneys' fee,"[21] the Court has

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[20] In *Jones* the Court did not decide whether the available remedy could include monetary relief, because it was satisfied that the plaintiffs would be made whole by an injunction enabling them "to purchase a home . . . at the price prevailing at the time of the wrongful refusal [to sell] . . .," thereby putting them in a position in which they would not "have suffered any uncompensated injury. . . ." *Id.* at 414 n.14. Relying on established remedial principles and the congressional directive contained in 42 U.S.C. §1988, the Court subsequently held that monetary relief was also available to make whole those injured by violations of 42 U.S.C. §1982. "The existence of a statutory right implies the existence of all necessary and appropriate remedies." *Sullivan v. Little Hunting Park*, 396 U.S. 229, 239 (1969).

[21] 42 U.S.C. §2000a-3(b).

held that a successful plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968). The *Newman* definition of discretion—tempered as it is by the overriding concern for justice, including the prohibition of fee awards which would be "unjust" to the losing defendant—is fully consistent with the traditional principles discussed above. Moreover, the Court has applied the *Newman* standard to Section 718 of the Emergency School Aid Act of 1972,[22] observing that "[t]he similarity of language in §718 and §204(b) is, of course, a strong indication that the two statutes should be interpreted pari passu." *Northcross v. Board of Educ.*, 412 U.S. 427, 428 (1973).[23]

In sum, it is rudimentary that an injured party must be placed as nearly as possible in the position he would have

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[22] 20 U.S.C. §1617 provides that "the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." This statute, like that involved in *Newman*, is couched in traditional discretionary language, described by the Court as "grant[ing] authority to a federal court to award a reasonable attorney's fee when appropriate in a school desegregation case." *Bradley v. School Bd. of City of Richmond*, 416 U.S. 696, 709 (1974).

[23] It is not a sufficient distinction of *Newman* and *Northcross* to say, as petitioners seek to do, that attorneys' fees are different from back pay. To be sure, there are differences, not the least of which is the fact that attorneys' fees go to lawyers while back pay is received by those who have directly suffered loss as a result of discriminatory practices – a distinction which should favor back pay. But the true importance of *Newman* and *Northcross* is that they establish a standard for exercising discretion which is consonant with the goal of justice.

attained but for the unlawful conduct. This well-settled principle has been strictly applied in the national endeavor to cure the evils of racial discrimination. Only in the most compelling of circumstances may full justice be compromised. The public properly expects that the courts will provide relief commensurate with the legal wrong. "It is the exceptional denial of recovery that disturbs these expectations." *Moragne v. State Marine Lines, supra,* 398 U.S. at 404. Such expectations will be frustrated and the national policy against discrimination will be impeded by "adherence to a rule unjustified in reason, which produces different results for breaches of duty in situations that cannot be differentiated in policy." *Id.* at 405.

This Court has uniformly imposed standards for the granting of relief to insure that an injured party will be made whole. Such standards have been adopted where Congress has created rights and simply conferred federal court jurisdiction to grant "discretionary" relief, where Congress has created rights but has remained silent regarding the question of private remedies, and where the rights stem from the Constitution and Congress has failed to authorize any remedies. Such a standard of "complete justice" is imperative here and in similar cases, unless Congress has dictated less by "a clear and valid legislative command."[24] To that consideration we now turn.

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[24] *Porter v. Warner Holding Co., supra,* 328 U.S. at 398. Since we conclude below that Congress has not commanded less than full relief from violations of Title VII, which operates to implement the Thirteenth and Fourteenth Amendments, we find it unnecessary to consider whether Congress could constitutionally insist on less effective remedies.

III.

NEITHER THE LANGUAGE NOR THE BACKGROUND OF THE STATUTE SUPPORT AN INFERENCE THAT CONGRESS INTENDED TO PROVIDE TITLE VII PLAINTIFFS WITH LESS THAN A FULL MEASURE OF RELIEF.

Section 706(g) of Title VII authorizes a district court, in response to unlawful employment practices, both to enjoin such practices and to "order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay. . . ." 42 U.S.C. §2000e-5(g). This open-ended remedial authorization obviously does not evidence "a clear and valid legislative command," or even "a necessary and inescapable inference" (*see* note 17, *supra*), that less than complete justice should be permitted. If it were nonetheless thought necessary to look beyond the plain words of the statute, only confirmation of the obvious is found: Congress intended that those subjected to employment discrimination should receive full restitution for their injuries. The legislative history surrounding the 1972 amendments to Title VII demonstrates that the only "clear and valid legislative command" is to make whole the prevailing plaintiffs.[25]

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[25] For example, the legislative history indicates unequivocally that:

> The provisions of this subsection [Section 706(g)] are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g), the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful practice complained of, *but also requires that persons aggrieved by the consequences and effects of the un-*

[footnote continued]

Additional evidence of Congress' purposes may be obtained from the National Labor Relations Act, 20 U.S.C. §160, upon which Section 706(g) was expressly modeled.[26] The NLRA has been interpreted from the earliest administrative[27] and judicial decisions to require full restitutionary relief. It is now well-settled that "the finding of an unfair labor practice is presumptive proof that some back pay is owed by the employer." *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 178 (2d Cir. 1965), *cert. denied*, 384 U.S. 972 (1966).[28] The controlling consideration is that relief in the form of back wages is necessary to restore the just economic status quo ante

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lawful practices be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination. 118 Cong. Rec. 7168 (1972) (Section-by-Section Analysis of House-Senate Conferees); *id.* at 3460-3463. *See also* 113 Cong. Rec. 2298-2302, 1861-1864. (emphasis added).

Congress was apparently referring to decisions such as *Robinson v. Lorillard Co.*, 444 F.2d 791 (4th Cir. 1971); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 720 (7th Cir. 1969).

[26] *See, e.g.*, 110 Cong. Rec. 7212-15, 6549 (1964).

[27] The National Labor Relations Board's first published order awarded back pay. *Pennsylvania Greyhound Lines, Inc.*, 1 NLRB 1, 51 (1935), *enf'd sub nom NLRB v. Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261 (1938).

[28] Reinstatement, including other affirmative relief required to make the employee whole, is also presumptive. *Cf. NLRB v. H.N. Thayer Corp.* 213 F.2d 748 (1st Cir. 1954), *cert. denied*, 348 U.S. 883 (1954); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). The Court has, however, acknowledged that in very unusual circumstances the Board may deny reinstatement of a discharged employee, such as where an individual seeks reemployment after offering his services as a labor spy. *Id.* at 195. *Cf. McDonell-Douglas Corp. v. Green*, 411 U.S. 792 (1973).

and to "make employees whole for losses suffered." *Nathanson v. NLRB*, 344 U. S. 25, 27 (1952).[29]

Similarly, the Fair Labor Standards Act, 20 U.S.C. §217, has been construed to require a comprehensive remedy, including restitution of wages unlawfully withheld by the employer. *Mitchell v. DeMario Jewelry, supra; Shultz v. Mistletoe Express Service, Inc.*, 434 F.2d 1267 (10th Cir. 1970); *Shultz v. Parke*, 413 F.2d 1364 (5th Cir. 1969); *Wirtz v. Malthor, Inc.*, 391 F.2d 1 (9th Cir. 1968); *Wirtz v. Atlas Roofing Mfg. Co.*, 377 F.2d 112 (5th Cir. 1967). The discretionary standard adopted by the Court of Appeals in this case is similar to that stated by Justice Harlan for this Court in *Mitchell v. DeMario Jewelry, supra*. Here, as there, there should be "little room for the exercise of discretion not to order reimbursement." 361 U.S. at 296.

The legislative policy of Title VII is thus the antithesis of "a clear and valid legislative command" that the courts should make less than whole those who are injured by unlawful employment practices. The traditional principles discussed above in Part II, as well as those developed under the NLRA and the FLSA, demand the adoption of a rule for Title VII requiring back-pay awards unless such awards would constitute manifest injustice to the defendants.[30]

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[29] *Accord, Phelps Dodge v. NLRB, supra*, 313 U.S. at 194; *NLRB v. Pennsylvania Greyhound Lines, Inc., supra,; NLRB v. Mastro Plastics Corp., supra; NLRB v. Rutter Rex Mfg. Co.*, 396 U.S. 258, 263 (1969). *See also Golden State Bottling Co. v. NLRB*, 414 U.S. 160, 176 (1974).

[30] The lower courts have generally reached a similar conclusion. *See, e.g., Robinson v. Lorillard Corp., supra; Head v. Timken Roller Bearing Co.*, 486 F.2d 870 (6th Cir. 1973); *Meadows v.*

[footnote continued]

IV.

BACK PAY IS ESSENTIAL TO EFFECTIVE ENFORCEMENT OF TITLE VII; THE SPECIAL CIRCUMSTANCES WHICH MIGHT JUSTIFY MORE LIMITED RELIEF MUST BE NARROWLY CIRCUMSCRIBED.

As we have demonstrated above, the award of back pay for wages lost as a result of unlawful conduct is an integral part of the complete relief required by both established doctrine and Title VII. Contrary to petitioners' claims (Company Brief at 60; Union Brief at 33), adherence to the principle of complete relief in this case will also substantially assist in making Title VII work[31] to eliminate employment discrimination. Once wrongdoers realize that they cannot escape restitution for their unlawful acts, the incentive to reform voluntarily increases dramatically.[32] As the Court has stated in another context:

Ford Motor Co., ___ F.2d___, 9 FEP Cases 180 (6th Cir. 1975); *Duhon v. Goodyear Tire & Rubber Co.*, 494 F.2d 817 (5th Cir. 1974); *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); *Bowe v. Colgate-Palmolive Co., supra; Johnson v. Georgia Highway Express Co.*, 417 F.2d 1122 (5th Cir. 1969); *U.S. v. Masonry Contractors*, 494 F.2d 870 (6th Cir. 1974); *United States v. Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973).

[31] See *Culpepper v. Reynolds Metals Co., supra*, 421 F.2d at 891.

[32] Petitioners argue that only those class members that have filed charges with the Equal Employment Opportunity Commission should be entitled to back-pay relief. The effect of this approach would be to render the provision of Rule 23 of the Federal Rules of Civil Procedure a nullity and to treat Title VII actions as a joinder of individual claims. The practical effect would be a deluge of identical charges to the EEOC for practices that an employer has repeatedly refused to eliminate voluntarily. Furthermore, each of those charges would ultimately

[footnote continued]

> The confidence of people in their ability to predict the legal consequences of their actions is vitally necessary to facilitate the planning of primary activity and to encourage the settlement of disputes without resort to the courts. *Moragne v. States Marine Lines, supra,* 398 U.S. at 403.

An example of the effectiveness of voluntary compliance where an agency operates under the "complete relief" standard is the Department of Labor's administrative enforcement of the Fair Labor Standards Act. In fiscal year 1974 the Department found violations of the Act's minimum wage, overtime and equal pay requirements affecting 341,000 workers. Employers then voluntarily made restitution to 263,000 of these workers—73 percent of the total.[33] In contrast, the Equal Employment Opportunity Commission, with the same enforcement authority but without a clear judicial standard from this Court with respect to back-pay awards, was able to muster only 2,279 successful conciliations out of a

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result in a separate lawsuit, thereby inundating the courts with tens of thousands of individual claims for relief. The petitioners' position has been repeatedly rejected by both the lower courts and Congress. *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, (5th Cir. 1968); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969). An amendment offered by Senator Hruska that would have required the filing of charges as a pre-condition to relief under Title VII was defeated. *Legislative History of the Equal Employment Opportunity Act of 1972*, 92d Cong., 2d Sess. at 1406, 1407 (Comm. Print. 1972).

[33] Minimum Wage and Maximum Hours Standards Under the Fair Labor Standards Act, U.S. Department of Labor Employment Standards Administration, An Economics Effect Study Submitted to Congress, 13-14 (1975).

pending-charge load of 80,516 in fiscal year 1973—or less than 3 percent.[34]

The award of back pay absent special circumstances will serve the overriding purpose of Title VII of the Act—prompt and complete elimination of employment discrimination and its effects. This Court should not limit back-pay relief except where such relief would be demonstrably unjust to the wrongdoer. Just what such circumstances would be must, of course, be determined on a case-by-case basis.[35] It is clear, however, that the two factors relied upon by the trial court are inappropriate.

First, the trial court found that petitioners had not engaged in their unlawful practices out of "bad faith." This Court has, however, already determined that the elusive concept of "good faith" does not exempt a violator from the remedial sanctions of Title VII,[36] any more than it can justify the maintenance of segregated parks[37] or segregated schools.[38] *Cf. Consolo v. Federal*

[34] Hearings on H.R. 15826 before the Subcommittee on Equal Opportunities of the House Committee on Education and Labor, 93d Cong., 2d Sess., 279, 290 (1975).

[35] The lower courts have indicated that such circumstances may be incurred where the employer discriminated because of the compulsion of state laws deemed at the time to be valid. *Schaeffer v. San Diego Yellow Cabs, Inc.*, 462 F.2d 1002 (9th Cir. 1972); *Kober v. Westinghouse*, 480 F.2d 240 (3d Cir. 1973); *Manning v. General Motors Co.*, 466 F.2d 812 (6th Cir. 1972); *LeBlanc v. Southern Bell Co.*, 466 F.2d 1228 (5th Cir.) *cert. denied*, 409 U.S. 990 (1972). Such circumstances also might be present in those situations described in 42 U.S.C. §2000e-12(b), where a defendant has relied on an opinion, written interpretation or instruction of the EEOC.

[36] *Griggs v. Duke Power Co., supra*, 401 U.S. at 431.

[37] *Watson v. City of Memphis, supra*, 373 U.S. at 535.

[38] *Wright v. Council of City of Emporia, supra*, 407 U.S. at 461-62.

Maritime Comm'n, 383 U.S. 607, 624-25 (1966). A "good faith" standard is particularly inappropriate in connection with relief in employment discrimination cases. The goal of Title VII is to eradicate discrimination and to make whole its victims. The object of back pay is restitution to the employee, not a penalty against the employer. If a good faith issue were injected as a standard governing relief, the focus of the litigation would be diverted from the real goal by requiring the trial court to referee an otherwise irrelevant name-calling contest among the litigants. Moreover, as with legislative enactments, "it is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind . . . [an employment practice]." *Palmer v. Thompson*, 403 U.S. 217, 224 (1971). The law's general preference for objective standards has particular relevance here, where the restitution is directed at making the victim whole, rather than penalizing the wrongdoer.

The district court's second reason for denying back pay is related to petitioners' claim that, notwithstanding the clear authority of Section 706(g), they were not put on notice that back pay was an issue until approximately a year prior to trial. This reason is legally insufficient, for it has long been the rule "that at a trial upon the merits the suitor shall have the relief appropriate to the facts that he has pleaded, whether he had prayed for it or not. *Cf.* Equity Rules 19 and 22." *Bemis Bros. Bag. Co. v. United States, supra,* 289 U.S. at 34 (Cardozo, J.).[39]

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[39] *See* Rule 54(c), Fed. R. Civ. P. Pecuniary relief has frequently been granted long after suit has been filed. *Columbia Nastic & Carter Caibone v. Columbia R. & C. Mfg. Co.*, 367 F.2d 308, 312 (2d Cir. 1966); *Edward B. Marks Music Corp. v. Charles K. Harris Music Pub. Co.*, 255 F.2d 518, 522-23 (3d Cir. 1958), *cert. denied*, 358 U.S. 831 (1958); *Kansas City-St. Louis*

[footnote continued]

Further, "it has never been the law that a litigant is absolved from liability for that time during which his litigation is pending." *Consolo v. Federal Maritime Comm'n, supra,* 383 U.S. at 624-25.

Title VII can work, and the purposes of Congress achieved, only if the justifications used to support a denial of back pay are far more compelling than those relied upon by the trial court in this case. Such justifications should involve unequivocal evidence of manifest injustice to defendants. Any less rigorous standard would defeat the national policies reflected in Title VII.

CONCLUSION

As shown above, the result reached and the standard applied by the Court of Appeals are in complete harmony with well-settled equitable and legal principles. The court's result and standard are required by those principles, absent legislation clearly mandating a less complete remedy. There is no such legislative command. To the contrary, the legislative directive here is to restore those injured by illegal racial discrimination to a status as near as possible to that which they would have obtained but for an accident of birth. It is not possible, of course, to make truly whole those who have suffered and who continue to suffer from the lingering vestiges of slavery. The injury to "their hearts and minds" is "unlikely ever

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& C.R. Co. v. Alton R. Co., 124 F.2d 780, 783 (7th Cir. 1941). In a factual situation virtually identical to this case, the Court awarded back pay, even though the Plaintiffs had not requested this remedy until after the commencement of trial. *Robinson v. Lorillard Co., supra. Cf. NLRB v. Rutter Rex Mfg. Co., supra* 396 U.S. at 164 (Lengthy delays by the NLRB, insufficient to limit an award of back pay).

to be undone." *Brown v. Board of Educ., supra,* 347 U.S. at 494. But the law at least requires vigorous judicial efforts to provide complete justice. Such a result has been equity's historic task. It reflects an overriding remedial principle that remains viable and that was fully adhered to by the Court of Appeals. It should again receive this Court's imprimatur.

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-389

ALBEMARLE PAPER COMPANY, *et al.*,

Petitioners,

v.

JOSEPH P. MOODY, *et al.*,

Respondents.

No. 74-428

HALIFAX LOCAL NO. 425, UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO,

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Respondents.

No. 74-428

HALIFAX LOCAL NO. 425, UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO,

Petitioners,

v.

JOSEPH P. MOODY, *et al.*,

Respondents.

BRIEF FOR RESPONDENTS

Questions Presented

I. Whether Albemarle's Testing Program Is Impermissible Under *Griggs* v. *Duke Power Company*—

A. Did Albemarle's tests disproportionately exclude black employees from jobs previously closed to them by overt segregation?

B. Did Albemarle fail to prove its testing program job-related?

C. Should Albemarle's unlawful testing program be enjoined?

II. Whether the Plaintiff Class Is Entitled to an Award of Back Pay—

A. Is the class back pay award within the District Court's power to provide a remedy for employment discrimination under Title VII?

B. Did the Court of Appeals state an appropriate standard for the exercise of remedial power to award back pay in keeping with the statutory purpose?

C. Are there specific factors which would warrant denial of the back pay remedy in this case?

Statement of the Case

The Parties

This case is a certified class action brought by a group of black paper mill workers who seek relief from practices of employment discrimination by their employer and union in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (A. 46-7, 474).

The paper mill, located in Roanoke Rapids, North Carolina, is fully described in the brief of Petitioner Albemarle (Co. Br. 4-10). The Petitioners, defendants below, are various corporations which have or had an interest in ownership of the mill and the local labor union

which represents the mill's hourly paid employees (A. 476).[1] Plaintiffs Moody and others are black employees or former employees of Albemarle and members or former members of Local 425. Plaintiffs represent a class of persons determined by the district court to include all Negro employees at the mill as of June 30, 1967, and all Negro employees at the mill thereafter who might be subjected to discrimination in initial job assignment or otherwise (A. 54, 474).

Factual Background

Albemarle's mill is functionally similar to other primary pulp-and-paper facilities (A. 477). As in other Southern paper mills, prior to the effective date of the Civil Rights Act of 1964, race was the absolute determinant of employment opportunities (A. 352).[2] The district court found that

> Prior to January 1, 1964, Albemarle's lines of progression were strictly segregated on the basis of race. Those lines of progression to which black employees were traditionally assigned were lower paying than the "white" lines of progression (A. 480).

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[1] The Petitioners in No. 74-389 are referred to herein as "Albemarle" or the "Company". Petitioner in No. 74-428 is referred to as "Local 425" or the "Union." Both are sometimes referred to as "defendants". Respondents Moody et al. are sometimes referred to as "plaintiffs".

[2] The Southern pulp-and-paper industry's nearly uniform discrimination practices have engendered dozens of Title VII suits. See, for example, *Local 189, United Papermakers & Paperworkers* v. *United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied* 397 U.S. 919 (1970); *Long* v. *Georgia Kraft Co.*, 450 F.2d 557 (5th Cir. 1971); and *Rogers* v. *International Paper Co.*, —— F.2d ——, 9 EPD ¶9865 (8th Cir. 1975).

The lines of progression (hereinafter "LOPs") reserved for whites included all 13 "skilled" lines.[3] Blacks were restricted to the remaining 6 LOPs.[4] Whites had access to approximately 86 jobs in the white LOPs while blacks were limited to approximately 14 jobs in their inferior LOPs (A. 477).

Employees promoted to the racially segregated LOPs from racially segregated "extra boards," which are essentially labor pools (A. 217). From the whites-only General Extra Board, employees moved into the all-white "skilled" lines of progression (A. 485, 219); the black Utility Extra Board fed the black "unskilled" LOPs (*id.*). Employees forced out of LOPs due to reduction-in-force went to the respective extra boards, and there retained priority recall rights to their former LOPs, in accordance with the segregated pattern (A. 485, 104).

In addition to the segregated production classifications arranged in LOPs, Albemarle employed over 100 mechanics in a Maintenance Department (A. 488-9, 484). Until 1964 no black person ever worked in Maintenance (A. 489).

Prior to the mill modernization of the 1950's, Albemarle had no educational or testing requirements for employees (A. 487-8). In 1952-3 it introduced a high-school education requirement for new hires into "skilled" progressions

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[3] Yard Crew LOP and Knife Grinder Job in the Woodyard Department; Paper Machine and Beaterman LOPs in the A Paper Mill Department; Finishing Crew, Shipping Crew, Paper Machine, and Stockroom LOPs in the B Paper Mill Department; Digester and C.E. Recovery LOPs in the Pulp Mill Department; Boiler Operator LOP in the Boiler Room Department; and the Mill and Laboratory LOPs in the Technical Services Department (A. 89).

[4] Chipper Operator and Service Crew LOPs in the Woodyard; Brokeman and Lead Loader LOPs in the A Paper Mill; Payloader LOP in the Pulp Mill; First Fireman LOP in the Boiler Room; and the "dead-end" janitor job (A. 89).

(A. 487, 237-8). Then in 1955-6, it introduced testing requirements for such new employees (A. 486, 329, 338). Under these policies, applicants had to satisfy the educational requirement and to achieve specified passing scores on the Revised Beta Examination and the Bennett Test of Mechanical Aptitude (A. 486). Albemarle fixed the passing scores on the basis of a concurrent validation study purportedly done on the two tests by the Company's then Personnel Manager after their introduction (A. 329-331, 340, 486-7).[5] Albemarle presented undocumented testimony that this study showed a significant correlation between Beta test scores and job performance in one department, the B Paper Mill (A. 99, 486-7, 330, 340-1). The study of the Bennett test, however, evidenced a negative correlation with job performance, i.e., the higher the test score, the less likely the testee was to succeed on the job (A. 330-1).

After about five years, Albemarle discontinued use of the Bennett because of the negative results, and decided to substitute a verbal intelligence test (A. 331). Based on the Personnel Manager's general familiarity with the Wonderlic Personnel test, and without attempting to validate it, Albemarle adopted the Wonderlic late in 1963 and used it subject to the nationally recommended cut-off score (A. 100, 487, 331-2). Since 1963, the Company has required both high school education and scores of 100 on the Beta test and 18 on the Wonderlic test (either Form A or Form B) for hiring or transfer into the "skilled" LOPs and the

[5] The individual who performed that study, Mr. Warren, did not testify. One witness who described the study, Mr. Bryan, was not at Albemarle until 1963 (Bryan deposition, plaintiffs' exhibit 32, p. 487 [not printed in Appendix]); the other witness, Mr. Boinest, admitted that he was "not a testing expert[;] I know nothing about the details of tests," and had only vague recollections of the study (A. 340-3). The validation study results were never reduced to writing; the only report of results was oral (A. 334-5).

Maintenance Department (A. 487, 99, 100, 332). Employees who worked in such positions before the introduction of these standards, however, were not required to qualify in order to retain their jobs or promote further in their LOPs (A. 488). Albemarle's application of educational and testing requirements to incumbent employees is closely similar to practices held unlawful in *Griggs* v. *Duke Power Co.*, see 401 U.S. 424, 427-8 (1971).

The Wonderlic test—the same test involved in *Griggs*—is a short intelligence test designed to measure verbal facility.[6] The Beta test is a written non-verbal examination

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[6] The test appears at A. 297-300 (Form A); A. 301-304 (Form B). The Wonderlic was developed by 1942 (A. 297, 301). Questions on the Wonderlic test include the following:

[Form A] #4 —Answer by printing YES or No—Does RSVP mean "reply not necessary"?

#23—Two of the following proverbs have the same meaning. Which ones are they?

1. Many a good cow hath a bad calf.
2. Like father, like son.
3. A miss is as good as a mile.
4. A man is known by the company the keeps.
5. They are seeds out of the same bowl.

#28—INGENIOUS INGENUOUS—Do these words have 1 similar meanings, 2 contradictory, 3 mean neither the same nor opposite?

#47—Assume that the first two statements are true. Is the final one: 1 true, 2 false, 3 not certain: Great men are ridiculed. I am ridiculed. I am a great man.

#50—In printing an article of 30,000 words, a printer decides to use two sizes of type. Using the larger type, a page contains 1200 words. Using the smaller type, a page contains 1500 words. The article is allotted 22 pages in a magazine. How many pages must be in the smaller type?

designed to measure the intelligence of non-English speaking persons or illiterates.[7] Albemarle's employment records show that black employees achieved lower scores than whites on both the Beta and Wonderlic tests and that blacks more frequently failed the tests (Pl. Ex. 10, Pl. Ex. 73, Co. Br. 29).

In 1964-5, the Company twice offered black employees the opportunity to transfer to white LOPs; Albemarle still required the employees to pass the tests but waived the high school requirement for those found test qualified (A. 225-6). The court found that some blacks passed and transferred, but that "a majority of those who took the tests failed them" (A. 488). Those who failed remained trapped in their traditional LOPs after 1965.

[Form B] #11—Are the meanings of the following sentences: 1 similar, 2 contradictory, 3 neither similar nor contradictory?

A faithful friend is a strong defense. They never taste who always drink.

#26—Assume that the first 2 statements are true. Is the final statement: 1 true, 2 false, 3 not certain? Most business men are progressive. Most business men are Republicans. Some progressive people are Republicans.

#42—CENSOR CENSURE—Do these words have 1 similar meanings, 2 contradictory, 3 mean neither same nor opposite?

#50—Three men form a partnership and agree to divide the profits equally. X invests $5500, Y invests $3500, and Z invests $1000. If the profits are $3000, how much less does X receive than if the profits were divided in proportion to the amount invested?

[7] Because the Beta test is pictorial rather than verbal, illustrative questions cannot conveniently be reproduced here. The test appears at A. 458-71. It was developed by the U.S. Army during World War I and last revised in 1946 (A. 487, 458).

Job segregation was reinforced before and after 1965 by a "job seniority" system governing employees' rights of promotion, transfer, demotion, layoff, and recall (A. 477-8). This system, which remained in effect until 1968, recognized three types of seniority: job seniority, defined as length of continuous service in a particular job classification in an LOP (or in any higher job in the same LOP) (A. 95, 288, 215-6); department seniority, defined as length of continuous service in a particular department (A. 95, 288, 215); and plant or mill seniority, defined as length of continuous service at the Roanoke Rapids facility (*id.*). Job seniority governed employee movement; promotions went to the employee with most job seniority in the next LOP job below the vacancy (A. 288).[8] Demotion due to workforce reduction was imposed on the employee with least job seniority (*id.*). Plant seniority governed layoffs out of the labor pool (extra boards) as well as noncompetitive employee benefits, but had no bearing on job competition (A. 216). Since black employees were not in white jobs or LOPs, they could not, under this system, accumulate any seniority in the "skilled" or white jobs.[9]

Although Albemarle and Local 425 contended that they ceased overt discrimination by the effective date of Title VII, July 2, 1965, the record shows and the district court found little actual integration of jobs after 1964. As of June 30, 1967, almost every job and LOP remained totally segregated. Only 6 of some 105 job classifications had both

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[8] The seniority provisions governing production employees in LOPs were inapplicable to Maintenance positions (A. 105, 222), and a production worker had no seniority right to transfer to any Maintenance job or to retain any accumulated seniority if he did so transfer (A. 222, 295).

[9] The racially discriminatory nature of this seniority system, in the circumstances of the Southern pulp-and-paper industry, has been widely recognized by the federal courts. See cases cited in n.2, *supra*.

white and black employees; 21 had only blacks and 76 only whites (2 were not occupied) (A. 481-484). Eleven LOPs[10] remained all white; four LOPs[11] were all black; only five LOPs[12] had both white and black employees, and they were "integrated" to only a token degree. The Maintenance Department consisted of 137 whites and one black, a 6th (level) Maintenance Employee Apprentice (A. 484). The extra boards remained racially distinct with 50 blacks and no whites on the Utility Extra Board and 62 whites, 2 blacks on the General Extra Board (A. 484-5). Based on these figures, the district court found that, "[t]he racial identifiability of jobs and departments in lines of progression were maintained subsequent to the effective date of Title VII (July 2, 1965)" (A. 480).

Albemarle and Local 425 negotiated certain changes in the seniority and transfer provisions of their collective bargaining agreement in 1968 (A. 479-80, 227). These changes did not eliminate the discriminatory features of defendants' seniority system (A. 495-7, 499).[13] An unlawful

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[10] Service Crew (Woodyard), Digester Capper, Caustic Operator, and C. E. Recovery Operator (Pulp Mill), Beaterman (A Mill), Stock Room (B Mill), Shipping Crew (B Mill Product), Power Plant, Boiler Room, Technical Service-Mill, Storeroom. Compare, A. 110, A. 481-4.

[11] Chipper Operator (Woodyard), Payloader (Pulp Mill), Brokeman and Finishing Room (A Mill). *Id.*

[12] Yard Crew (Woodyard) (one black in lowest job only), Paper Machine (A Mill) (one black in next to lowest job), Paper Machine (B Mill) (one black in lowest job), Finishing Crew (B Mill Product) (two blacks), Technical Service—Lab (one black in lowest job). *Id.*

[13] The 1968 seniority changes gave employees the right to apply in writing for transfer to another LOP (Section 10.2.1, A. 479, 214, 239-40). The decision whether to allow such transfer and the choice among applicants remained within the Company's sole and uncontrolled discretion *(id.)*. When such transfer was allowed, the transferring employee immediately lost his seniority in his previous department, and could recover it only in the event his health

seniority system remained in effect until entry of the district court's decree (A. 499-507).

The Company and Union also agreed in the 1968 contract to a number of structural changes in the LOPs (A. 485). The district court found this restructuring of LOPs "had the effect of eliminating, to some extent, their strictly segregated composition. However, it is to be noted that black employees were still 'locked' in the lower paying job classifications" (A. 485).[14] The continuing "lock-in" of blacks was predictable, since the "mergers" were implemented in a manner that minimized opportunities for black employees.[15] Thus, while the 1968 LOP changes may have helped to rationalize the Company's progressions from a

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or physical condition required a transfer back; apart from this eventuality the initial transfer was irrevocable *(id.)*. Albemarle recognized the right to transfer only to the bottom-level position in a new LOP (A. 292). The contract gave transferring employees department and job seniority in their new classification equal to their previously accumulated seniority (Section 10.2.2, A. 479); however it did not provide for the use of such "carry-over" job seniority in subsequent promotions to positions above the classification transferred into (A. 479, 239). The contract did provide for carry-over rate retention or "red-circling" privileges (Section 10.2.3, A. 479-80, 233). Since the contract had no provision for posting job vacancies or for any other formal method of informing employees of particular job opportunities, it left black employees totally dependent on a word-of-mouth network emanating, of course, from Albemarle's white supervision and management, for information about job openings for which they might apply (A. 241-242).

[14] The court noted that blacks occupied the bottom 25 job positions in the "integrated" Woodyard. The same chart shows that whites occupied the top 26 positions (A. 485-6).

[15] Thus, the black Brokeman LOP in the A Paper Mill was tacked on to the bottom of the short and relatively low-paying white Beater Room LOP but remained cut off from the high-paying A Mill Paper Machine LOP (compare A. 109, 110). In the Woodyard, the separate black Chipper Crew "dovetailed" into the white Crane Operator LOP with the result that only *one* black job (Chipper Operator #2) was placed ahead of a single white job (Chain Operator); all other blacks remained behind all other whites,

functional standpoint,[16] they did little to overcome the isolation of black employees in inferior positions.

The 1968 merger of segregated extra boards preserved the pre-existing patterns of segregation. Although employees could thereafter move from the merged extra board into any LOP (subject to test, educational, and qualifications requirements), recall priority for a particular LOP was reserved to employees who had previously worked in that LOP during the time of strict segregation (A. 486). As the district court found, "[t]he effect of this practice is that black employees are recalled to black jobs and white employees are recalled to white jobs" (*id.*).

The income disparity between white and black workers under the regime described above was substantial. The all-black LOPs were among the lowest paying in the mill; the all-white LOPs were among the highest paying; and in

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locked in job seniority order *(id.)*. A separate Service Department was established by removing the black Service Crew LOP from the Woodyard and placing it beneath the black Payloader job from the Pulp Mill; no blacks gained access to any white jobs by this move *(id)*. The Pulp Mill Department underwent substantial changes, without benefit to that department's black employees. The white Kamyr Operator job was removed from the white Digester LOP and placed at the top of the black progression leading to Lift Truck Operator (compare A. 109, 110, A. 481-2); however, within a few months the Kamyr was shut down, depriving blacks of access to that job (A. 245). A number of other positions (Bark Burner, Boiler Operator) were removed to another department, the Boiler Room, and there consolidated with the existing Fireman LOP (compare A. 109, 110); but there is no evidence that these black jobs were then staffed (see A. 481-4), and even if so, they were placed beneath the white jobs brought into their department (A. 109).

[16] The record clearly shows, Albemarle's protestations notwithstanding (Br. 5), that departments such as the Pulp Mill and the A Paper Mill were *not* organized into functionally related LOPs before the 1968 mergers. See A. 231-2. Race may well have been the reason behind the non-functional LOPs.

racially mixed departments the white employees' wages greatly exceeded the blacks' wages.[17]

Proceedings Below

The proceedings in this case took place against the background of the historical discrimination practices described above. Plaintiffs filed their charges before the Equal Employment Opportunity Commission ("EEOC") on May 9, 1966 (A. 273-285) and their complaint on August 25, 1966 (A. 6-10). Defendants immediately filed motions to dismiss and for summary judgment challenging, *inter alia*, the maintenance of the class action (A. 1). In response to one of those motions and in reliance on newly amended Rule 23(b)(2), F.R.Civ.P., and the only then-existing precedent

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[17] The following table, based on the job composition data at A. 481-5 and the hourly wage rates for June 30, 1967 shown at Pl. Ex. 14, App. A, pp. 34 *et seq.*, graphically shows the disparities:

Segregated LOPs & Departments

Name & Race	*No. of Employees*	*Avg. Wage*
1. Woodyard Service Crew—Black	11	$2.45/hr.
2. A Mill Finishing—Black	5	2.47/hr.
3. Technical Service—White	23 (1 B)	2.58/hr.
4. Storeroom—White	3	2.79/hr.
5. Power Plant—White	16	2.94/hr.
6. Maintenance—White	138 (1 B)	3.42/hr.
7. Boiler Room—White	4	3.63/hr.

Racially Mixed LOPs and Departments

Name	*Racial Breakdown*		*Average Black Wage*	*Average White Wage*
1. Pulp Mill	7B	57W	$2.38/hr.	$3.08/hr.
2. B Paper Mill	6B	69W	2.40/hr.	3.24/hr.
3. B Mill Product	5B	70W	2.40/hr.	2.56/hr.
4. A Paper Mill	6B	48W	2.42/hr.	2.71/hr.
5. Woodyard Yard Crew	26B	34W	2.43/hr.	3.21/hr.

on Title VII class actions, *Hall* v. *Werthan Bag Co.*, 251 F. Supp. 184 (M.D. Tenn. 1966), plaintiffs filed a memorandum stating that no back pay was sought "for any member of the class not before the court" (A. 11-14). This position was based on the belief that, "It may well be that any employee seeking separate and specific relief such as an individual promotion should first address his claim to the [Equal Employment Opportunity] Commission" (A 14).[18]

In October, 1968, several of the corporate defendants executed a "corporate reshuffle" (A. 35) in which the mill's assets and liabilities changed hands (A. 31-34, 41-42). Thereafter, on September 29, 1970, the district court granted plaintiffs' motion to join the successor and parent corporations of the initial defendant company (A. 38-39). In its ruling, the Court noted that Rule 54(c), F.R.Civ.P., required it to grant plaintiffs all relief to which they were entitled, whether specifically pleaded or not, and that the back pay issue was "litigable" (A. 38). Plaintiffs' claim for back pay had in fact been explicitly stated to counsel for Albemarle in a telephone conversation on April 8, 1970.[19] Albemarle's counsel indicated his awareness of the claim in a letter to the Court dated June 12, 1970 (A. 29).

On March 8, 1971, this Court handed down *Griggs* v. *Duke Power Co., supra.* Albemarle thereupon retained a

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[18] That possibility was subsequently rejected by the courts, see *Oatis* v. *Crown-Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968); *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969); *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969).

[19] See "Memorandum of Counsel for the Defendant 'Old' Albemarle Paper Company," filed August 17, 1970, p. 9 [not reproduced in Appendix].

This was just over 3½ years after suit was brought, rather than 5 years as the district court stated in denying back pay (A. 498). This notice came well over 15 months before trial began.

testing expert, Dr. Joseph Tiffin, to perform a validation study of its test battery in the few months remaining before trial (A. 489). Dr. Tiffin began to work on the study in April or May of 1971 (A. 185-6) and produced his report (A. 431-8) just in time for trial in July, 1971. The Tiffin report concluded that both the Beta and the Wonderlic A tests could properly be used as Albemarle was using them (A. 438, 491, 171). The conclusion was based on a correlation analysis which purported to demonstrate that at least one of Albemarle's three tests was significantly related to performance on nine of ten job groups studied (A. 431, 491). Dr. Tiffin conducted his study by the "concurrent criterion-related validation" method (A. 490). He selected and grouped jobs from the middle to upper range of 10 LOPs in five different departments (A. 432-7). All employees in those job groups, except a few who refused, took the tests for correlation purposes (A. 490, 186). These employees' supervisors were asked to rate their job performance (A. 490, 187). No separate study was made of correlations between test scores and job performance of black employees.

In the months before trial the district court entered a series of orders related to case management and the class action. On June 15, 1971, the court defined plaintiffs' class and "reserved ruling" on whether it could recover back pay (A. 46-7). On June 18, 1971, the court entered an order barring all parties and their counsel from communicating directly or indirectly with class members during the period when they received notice and when final trial preparation took place (A. 48-9). On July 8, 1971, the court held that back pay could be awarded under *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971), *cert. dismissed* 404 U.S. 1006 (1971), and directed that notice be given to class members requiring them to file a written "proof of claim"

as a precondition to individual recovery (A. 50-51, 55-56).[20] A total of 80 employees signed "proof of claim" forms bringing their back pay claims "before the court" (A. 70-85).

After trial, on November 9, 1971, the district court entered findings of fact, conclusions of law, and judgment. The court held that defendants' seniority system both before and after the 1968 revisions had perpetuated the effects of past discrimination and was not required by "business necessity" (A. 495-497). Accordingly, the court decreed substitution of a plant seniority system with job posting, red-circling, and minimum residency periods (A. 499-502). The court also held unlawful Albemarle's high school education requirement and permanently enjoined its use (A. 497, 502).[21] However, the district court examined the test battery for job-relatedness and concluded that it had been adequately validated and was, therefore, permissible under Title VII (A. 497, 495). Finally, the court allowed no back pay (A. 502). It recited three reasons for denying plaintiffs' claim: that Section 706(g) of Title VII, 42 U.S.C. §2000e-5(g), vests the district court with discretion to withhold back pay; that Albemarle had exhibited good faith in attempting (unsuccessfully) to comply with the Act; and that plaintiffs' allegedly late assertion of their back pay claim might have prejudiced defendants (A. 497-8).

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[20] The notice provided that failure to file "proof of claim" by July 22, 1971, four days before trial, would cause claims to be "forever barred" (A. 56).

Plaintiffs thereupon moved for leave to communicate with class members for purposes of trial preparation (A. 57), for clarification of the "opt-in" notice provisions (A. 64), and for severance of back pay proceedings from the initial determination of liability (A. 68). The court did not rule on these motions.

[21] There was no appeal from these two aspects of the court's ruling.

The Court of Appeals reversed in plaintiffs' favor on both the testing and back pay issues (A. 511-524). The Court's opinion held both that the testing program had an adverse impact on black employees and that Albemarle had failed to prove it demonstrably job-related as required by *Griggs* (A. 513-520). The Court further held that the purposes of Title VII require that back pay be awarded to compensate for wages lost due to discrimination, in the absence of "special circumstances that would render such an award unjust" (A. 520-524), and that no such circumstances appeared in this record (A. 524).

Summary of Argument

I.

This Court's decision in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), controls the question of whether the use of various tests to determine promotions violated the Title VII rights of black employees. The Court of Appeals properly held that all of the tests used disproportionately excluded blacks from formerly white jobs. The Company, on the other hand, failed to meet the burden imposed by *Griggs* to demonstrate "a manifest relationship to the employment in question." In particular, Albemarle did not present sufficient proof that the tests were in fact accurate predictors of job performance, or that they had been validated pursuant to the guidelines established by the Equal Employment Opportunit[y] Commission and endorsed by this Court in *Griggs*. In contending that the guidelines should not be followed, Albemarle is asking this Court to overrule its well-reasoned opinion in *Griggs*, and to reject the consistent reliance of lower courts on that decision. The Court should reaffirm that the guidelines,

which incorporate accepted professional standards, provide the proper standards that should be met by employers in using tests that may deny equal opportunity to blacks and affirm the Fourth Circuit's application of *Griggs* in this case. Accordingly, the use of these unlawful tests was properly enjoined in order to prevent the continued denial of promotional opportunities to black employees.

II.

All Courts of Appeals ruling on the issue have held that Title VII authorizes an award of back pay to the members of the class of black (or other minority) employees adversely affected by discriminatory employment practices. The legislative history of the 1972 amendments to Title VII make it clear that Congress intended that such relief be available. Thus, a House provision that would have restricted the availability of back pay was rejected by the Senate and the Senate's position was adopted by the Conference Committee. The rejection of class back pay by this Court is thus unwarranted and would result in the substantial weakening of Title VII as an effective remedy against employment discrimination.

This Court should hold that back pay should be awarded to a class that has established a violation of Title VII unless special circumstances would render such an award unjust. This standard has been adopted by the Fourth, Fifth, and Sixth Circuits. It will ensure the effectuation of the Act's purpose, viz., to ensure that persons economically harmed by discrimination will receive restitution. Only if the victims of racial discrimination obtain the most complete relief possible, as do victims of unfair labor practices under the N.L.R.A., will the Congressional purpose be fulfilled. The standard does not, however, mean that district courts will have no discretion. Rather, there are instances

in which a denial of back pay may be justified; there is broad discretion in determining appropriate methods for calculating the amount of back pay and in the allocation of liability between defendants. Thus, the standard enunciated by the Court of Appeals is fully consistent with this Court's discussion of back pay in *Curtis* v. *Loether,* 415 U.S. 189 (1974), and with the holding regarding the award of attorneys' fees in *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400 (1968). Finally, the facts of the present case do not present the kind of special circumstances that would justify a failure to award back pay.

ARGUMENT

I.

Albemarle's Testing Program Is Unlawful Under *Griggs* v. *Duke Power Company.*

In this case the Court must apply principles first enunciated in *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971). The facts concerning the tests involved here and their usage by Albemarle are closely similar to those in *Griggs,* see *supra* pp. 4-6. While *Griggs* provides the point of departure, it does not specifically answer the questions presented here. In *Griggs,* the employer had not attempted an empirical demonstration of the tests' job-relatedness but relied on their having been "professionally developed," *cf.* 42 U.S.C. § 2000e-2(h). Here, the employer has gone one step farther by conducting a correlation analysis purporting to show that its tests accurately predict job performance.

This case is controlled by *Griggs* principles despite the superficial difference in its factual context. Close scrutiny of the *results* of Albemarle's validation study demon-

strates that they fail to prove the test battery "manifestly job-related" in a majority of cases; therefore, here as in *Griggs*, the employer's test is unvalidated (part B.1, *infra*). Moreover, the Company's validation procedures were so inadequate that even those results cannot be credited; therefore, the employer has failed to carry its burden of showing its tests "manifestly job-related" (part B.2, *infra*).[22]

The significance of this case for the future of employment testing litigation in the post-*Griggs* era is plain. If Albemarle met its *Griggs* burden, then that case requires little more than a *pro forma* exercise submitted to the district court over the signature of a certified industrial psychologist.[23]

A. The Tests Adversely Affect Black Employees.

Albemarle's tests disproportionately screen out black employees from higher paying jobs. The Company does not deny that the statistical evidence shows a higher average

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[22] Both Albemarle and amicus curiae American Society for Personnel Administration have sought to inject an issue concerning the requirement of "differential validation," see 29 C.F.R. § 1607.4 (a) (A. 309), in this case. Co. Br. at 41, ASPA Br. at 28-30. They seek an advisory opinion. The district court found that such study in this case was "technically infeasible," *cf.* 29 C.F.R. § 1607.4 (A. 309). This was not an issue on appeal and is not before the Court.

[23] Albemarle's widely used Wonderlic test has never survived full judicial scrutiny in an employment discrimination case. Every appellate decision to pass on Wonderlic has held it unlawful in that it adversely affects black job candidates and has not been shown to be job-related. See, *e.g.*, *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Rogers* v. *International Paper Co.*, *supra*; *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1372-3 (5th Cir. 1974); *Young* v. *Edgcombe Steel Co.*, 499 F.2d 97, 98 (4th Cir. 1974). The Company would justify using this test on the basis of little more than its expert's say-so, see part B, *infra*.

score for whites than for blacks on both tests.[24] Moreover, these average scores understate the black-white disparity because they do not take into account the large number of black employees who failed the tests but whose numerical scores were not recorded.[25] The district court found that when Albemarle administered the tests to incumbent black employees in 1964-5, "a majority of those who took the tests failed them" (A. 488).[25a] Furthermore, the district court found that the "skilled" LOPs and General Extra Board, for which the tests were required, remained "essentially segregated because of the inability of black employees to meet the educational and testing requirements" (A. 496).

Plaintiffs' expert witness, Dr. Raymond Katzell, testified that blacks generally score lower than whites on paper and pencil examinations; the reasons for this phenomenon are

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[24] Plaintiffs' Exhibit 10 shows that whites averaged over 7 points higher than blacks on the Wonderlic test, as Albemarle concedes, Br. at 29. Albemarle also does not dispute the existence of a disparity of over 3 points in test scores on the Beta examination, *id.* Plaintiffs' Exhibits 10 and 73 [not printed in Appendix] list the available test scores of Albemarle's employees.

[25] Plaintiffs' Exhibit 10 lists 12 black employees who failed the tests, without giving their scores. This number amounts to nearly half the number of blacks (15), whose scores were averaged; of those 15, only 3 failed. Thus, the average scores omit 80% of the blacks who did not pass. The averages also exclude the scores of at least 12 whites, listed only as "OK" on the tests, whose scores were apparently passing. This listing does not indicate whether unsuccessful employees failed the Wonderlic, the Beta, or both. However, it is pertinent that every black employee whose scores appear on Plaintiffs' Exhibit 10 either failed both tests, or passed both.

[25a] This is confirmed by the data on Plaintiffs' Exhibit 10, see n.25, *supra*, showing that of 27 blacks with recorded results 15 (56%) failed the test battery. By contrast, the exhibit shows that of whites with scores or test success indicated, 90% passed the Beta and over 95% passed the Wonderlic.

unclear but are thought to include inferior schooling[26] and the reaction of black test takers to examination situations (A. 1382-3, 493). Dr. Katzell recalled data showing that blacks usually score less well than whites on intelligence tests similar to the Beta (A. 406). Significantly, neither Albemarle's expert witness nor the Company itself, which had full access to all test scoring data, made any attempt to introduce evidence or opinion that blacks were not disproportionately screened out by Albemarle's tests or by written examinations generally. On this showing, the Court of Appeals held that "[t]he plaintiffs made a sufficient showing below that Albemarle's testing procedures have a racial impact," 474 F.2d at 138 (A. 515).[27]

The federal courts in employment discrimination cases have repeatedly found that tests like those used by Albemarle have an adverse impact on black job applicants. In particular, this Court and lower courts have consistently found that the Wonderlic test screens out blacks.[28] Re-

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[26] *Cf. Griggs* v. *Duke Power Co., supra,* 401 U.S. at 431.

[27] The Court of Appeals also referred to a study, *Negro Norms, A Study of 38,452 Job Applicants for Affirmative Action Programs* (1972), published by E. F. Wonderlic Associates, Inc. The study became available only after trial and was lodged with the Court of Appeals during briefing. It shows a median black score of 15 on the Wonderlic and a white median of 23 (pp. 11, 13).

[28] See, *e.g., Griggs* v. *Duke Power Co., supra,* 401 U.S. at 430 (Wonderlic); *Rogers* v. *International Paper Co., supra,* 9 EPD at p. 6592 (Wonderlic); *Franks* v. *Bowman Transportation Co.,* 495 F.2d 398, 412 (5th Cir. 1974), *cert. denied* 42 L.Ed.2d 644 (1974) ("the race-oriented Wonderlic"); *Duhon* v. *Goodyear Tire & Rubber Co.,* 494 F.2d 817, 818-819 (5th Cir. 1974) (Wonderlic); *Johnson* v. *Goodyear Tire & Rubber Co.,* 491 F.2d 1364, 1372 (5th Cir. 1974) (Wonderlic); *United States* v. *Georgia Power Co.,* 474 F.2d 906, 912 n.5 (5th Cir. 1973); *United States* v. *Jacksonville Terminal Co.,* 451 F.2d 418, 455-6 (5th Cir. 1971), *cert. denied* 406 U.S. 906 (1972); *Young* v. *Edgcombe Steel Co.,* 499 F.2d 97, 98, 100 (4th Cir. 1974) (Wonderlic); *Brito* v. *Zia Co.,* 478 F.2d 1200, 1203 (10th Cir. 1973); *Stamps* v. *Detroit Edison Co.,* 365

spondents are not aware of any reported final decisions in which tests like Albemarle's were found to be *without* adverse racial effect.[29] The other cases, therefore, confirm what this record shows: at Albemarle as elsewhere, written examinations typically operate as powerful "built-in-headwinds" to black employees, *cf. Griggs, supra,* 401 U.S. at 432.

This Court's ruling in *Griggs* was based on far less evidence of adverse racial impact than is presented here. The record in *Griggs* contained no evidence of actual test scores; rather, the Court properly assumed that the general observation of racial disparities would hold true, as plaintiffs' expert had testified, 401 U.S. at 430 n.6.[30]

F. Supp. 87 (E.D. Mich. 1973), *aff'd in pert. part sub. nom. EEOC* v. *Detroit Edison Co.*, —— F.2d —— (6th Cir. No. 74-1007, March 11, 1975).

The same finding of adverse impact has consistently held true in the case of written civil-service examinations of public employers. See, *e.g., Douglas* v. *Hampton*, —— F.2d —— (D.C. Cir. No. 72-1376, Feb. 27, 1975); *Davis* v. *Washington*, —— F.2d —— (D.C. Cir. No. 72-2105, Feb. 27, 1975); *Castro* v. *Beecher*, 459 F.2d 725, 729 (1st Cir. 1972); *Boston Chapter N.A.A.C.P., Inc.* v. *Beecher*, 504 F.2d 1017, 1019-20 (1st Cir. 1974); *Chance* v. *Board of Examiners*, 458 F.2d 1167, 1171 (2nd Cir. 1972); *Bridgeport Guardians, Inc.* v. *Civil Service Commission*, 482 F.2d 1333, 1335 (2nd Cir. 1972); *Commonwealth of Pennsylvania* v. *O'Neill*, 348 F. Supp. 1084, 1089-90 (E.D. Pa. 1973), *aff'd in pert. part* 473 F.2d 1029 (3rd Cir. *en banc* 1973); *Carter* v. *Gallagher*, 452 F.2d 315, 323 (8th Cir. 1972), *upheld* 452 F.2d 327 (8th Cir. *en banc*), *cert. denied* 406 U.S. 950 (1972).

[29] *Stevenson* v. *International Paper Co.*, 352 F. Supp. 230 (S.D. Ala. 1972), on appeal 5th Cir. No. 73-1758 (same testing program as in *Rogers* v. *International Paper Co., supra*), and *Watkins* v. *Scott Paper Co.*, 6 EPD ¶ 8912 (S.D. Ala. 1973), on appeal 5th Cir. No. 74-1001, are both being appealed on this issue.

[30] As Judge Friendly recently observed, "complete mathematical certainty" of proof should not be required on this issue, particularly since a showing of adverse impact "simply places on the dependants a burden of justification which they should not be

Albemarle's assertions that there was "absolutely no evidence" of the Beta's disparate effect (Br. at 29), and "deficient" proof as to that of the Wonderlic (Br. at 30), ignores the many uncontradicted indications summarized above. Likewise the Company's charge that the adverse impact issue never arose in the district court is mistaken. The district court knew that under *Griggs* it need not have reached the issue of job-relatedness unless it found adverse impact. The court concluded that testing practices blocked black employes from the white lines of progression (A. 488, 496). Therefore, the court proceeded to examine the validation evidence as *Griggs* requires (A. 489-91).

There is no basis for this Court to reverse the well-supported finding below that Albemarle's testing program tended to exclude black workers.

B. Albemarle Failed to Prove the Job-Relatedness of Its Testing Program.

Because Albemarle's tests disqualify blacks at a higher rate than whites, the Company must show that the tests have "a manifest relationship to the employment in question," *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 432. The Company attempts to meet that burden primarily by reliance on an empirical correlation analysis performed after the *Griggs* decision in the Spring of 1971.[31] That

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unwilling to assume," *Vulcan Society* v. *Civil Service Commission,* 490 F.2d 387, 393 (2nd Cir. 1973). See also, *Rogers* v. *International Paper Co., supra,* 9 EPD at p. 6592; *Boston Chapter NAACP, Inc.* v. *Beecher, supra,* 504 F.2d at 1021; *Douglas* v. *Hampton, supra,* slip op. at 8-13.

[31] Albemarle also suggests two further bases for a finding of job-relatedness, but these arguments are insubstantial.

First, it argues that the tests are job-related because they were designed to measure intelligence and reading ability, which were found to be necessary for successful performance in skilled LOPs (Br. 32-33). But this tautological reasoning begs the question which

validation study will not support a finding of job-relatedness.[32]

1. *Results Showing Lack of Job-Relatedness.*

Albemarle's own validation study demonstrates that the tests are not job-related for most of the jobs for which they are required. Albemarle's expert, Dr. Tiffin, attempted to validate each of three tests for each of ten job groupings. The groups came from 8 LOPs in 5 departments (A. 514). He reported, and the district court found, statistically significant correlations between job performance and test scores on one or another of the three tests in nine of the ten job groups (A. 431, 491). Such correlations were found for all three tests in only one of the ten groups (#4); and, for the Beta and either Wonderlic A or Wonderlic B,[33] in only one other group (#8) (A. 432). In eight of the ten groups, Dr. Tiffin did not find a significant correlation for both the Beta and a Wonderlic test; in three groups (#s 1, 2, 5) he found only one of the three tests

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Griggs frames: apart from the employer's purpose in utilizing the tests, is there convincing proof that the tests actually do measure ability to perform the job?

Second, it adverts to a purported validation study of the Beta test in 1958 (Br. at 33). The unwritten results of this study, which were described in conclusory terms (see p. 5, *supra*), are surely inadequate to meet the employer's burden of proof. And Albemarle made no effort to validate the Wonderlic test when introduced or thereafter, until 1971.

The district court relied on neither argument. Its holding of job-relatedness was based on the 1971 study.

[32] Technical terms encountered in the discussion of Albemarle's purported demonstration of job-relatedness are defined or described in an Appendix to this brief, "Glossary of Technical Terms Relevant to the Testing Issue."

[33] Test success on the Beta and either Wonderlic A or Wonderlic B is Albemarle's selection criterion, see p. 5, *supra*.

job-related; and in one group (#6) he found none of the tests had significant predictive value (*id.*).[34]

Thus, for 80% of the job groups studied, Albemarle's two-test battery, as used, was *not* found job related. This fact alone is dispositive. As the Court of Appeals held, "it was also error to approve requiring applicants to pass two tests for positions where only one test was validated" (474 F.2d at 140; A. 519). Cf. *United States* v. *Georgia Power Co., supra,* 474 F.2d at 916-7.

A close reading of the correlation data for particular tests casts further doubt on the conclusion Dr. Tiffin drew from the results. In ten correlations of the Beta test, he found only three statistically significant relationships, six correlations not deemed scientifically significant, two perfectly random correlations,[35] and one negative correlation.[36] Moreover, the study finds notable discrepancies between the

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[34] Dr. Tiffin's results are summarized in the following table in terms of whether statistically significant correlations were found:

Job Group	*Statistically Significant Correlations?*				
[by number]	Beta	W-A	W-B	All 3	B plus W (A orB)
1	No	Yes	No	No	No
2	Yes	No	No	No	No
3	No	Yes	Yes	No	No
4	Yes	Yes	Yes	Yes	Yes
5	No	Yes	No	No	No
6	No	No	No	No	No
7	No	Yes	Yes	No	No
8	Yes	No	Yes	No	Yes
9	No	Yes	Yes	No	No
10	No	Yes	Yes	No	No

Source: A. 432, compare A. 431.

[35] Job groups 3 and 5 show 0.00 correlation coefficients (A. 432). This means that the relationship between test scores and job performance was haphazard.

[36] Job group 6 shows a —.50 coefficient (A. 432), indicating that the higher test scorers performed less well on the job.

correlations found for the supposedly interchangeable Wonderlic Forms A and B.[37]

No correlation results were reported for many LOPs to which testing applied during the period relevant to this case. The district court found that test requirements had applied in 14 LOPs in 8 departments since 1963 (A. 487). Although operations had been curtailed in some of these LOPs or testing requirements otherwise eliminated after 1968, the relationship of the two tests to all the LOPs is relevant both as to back pay liability and for its bearing on the tests' job-relatedness in the similar LOPs to which testing currently applies. In any event, the results are not convincing even with respect to the four departments in which testing continued.[38]

The Court of Appeals correctly concluded that Albemarle showed too little evidence of job-relatedness for too small a part of its testing program to meet the burden of *Griggs*. Even taken at face value, the study's results do not substantiate a claim of job-relatedness for Albemarle's tests as they have been used.

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[37] The two forms are identical in form and content (compare A. 297-300, A. 301-304) and are supposed to be utilized as alternative forms of a single test. E. F. Wonderlic Associates, Wonderlic Personnel Test Manual 2 (1961).

Nevertheless, in one job group (#1), Wonderlic A achieved a rare perfect (1.00) correlation, while Wonderlic B showed no significant correlation (A. 432). In another (#8), Wonderlic B correlated perfectly but Wonderlic A was negatively related to job performance (*id.*).

[38] The Beta test correlated significantly only with the Technical Services job group (#4) and one (#2) of three Pulp Mill groups. It failed to correlate significantly with two other Pulp Mill groups (#s 1, 9), the Power Plant group (#10), and all 3 B Mill groups (#s 5, 6, 7). Wonderlic A did not show significant correlations for one of three groups in both the B Mill (#6) and the Pulp Mill (#2). Wonderlic B failed to show significant job-relatedness for two of three groups in both the B Mill (#s 5, 6), and the Pulp Mill (#s 1, 2). (A. 432)

2. *Inadequacy of the Validation Study.*

The Court of Appeals held Albemarle's validation procedures inadequate to support any conclusion of job-relatedness (474 F.2d at 139, A. 516).[39] It measured the study's deficiencies in part by standards embodied in the EEOC Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1970), A. 516-520. Albemarle attacks the Court's reliance on these Guidelines as improper (Br. 34-36).[40] The issues raised by the validation procedures therefore turn both on the weight to be given the EEOC Guidelines and on the specific failures of the study to comply with sound validation practice.

This Court in *Griggs* endorsed the Guidelines:

> The Equal Employment Opportunity Commission, having enforcement responsibility, has issued guidelines interpreting § 703(h) to permit only the use of job-related tests. The administrative interpretation of the Act by the enforcing agency is entitled to great deference. . . . Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress. 401 U.S. at 434. (footnote and citations omitted)

Its holding is consistent with a line of decisions stating that courts should defer to the subject-matter expertise of administrative agencies designated by Congress to imple-

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[39] An explanation of the proper method of validating a test by plaintiffs' expert witness appears at A. 205-6. Dr. Tiffin did not dispute that explanation (A. 209).

[40] Albemarle appears to concede that the validation procedures fall short of the Guidelines standards.

ment regulatory statutes.[41] Virtually every lower court confronted with a test-validation issue in a private employer discrimination case has agreed that the Guidelines are appropriate standards.[42] The Guidelines have appeared so persuasive and reasonable to the courts that many circuits have also looked to them in public-employer testing cases not brought under Title VII.[43]

Petitioner Albemarle and amicus ASPA criticize the Guidelines as unreasonably restrictive and their judicial implementation as unnecessarily rigid. But the courts have not required slavish adherence to each detail of the Guidelines.[44] The Court of Appeals did not do so in this case. Rather, the courts have taken the Guidelines as sensible, reasonable general principles that should ordinarily be

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[41] *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965); *United States* v. *City of Chicago*, 400 U.S. 8, 10 (1970); *Power Reactor Development Co.* v. *Electrical Union*, 367 U.S. 396, 408 (1961); *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 210 (1972); *N.L.R.B.* v. *Boeing Co.*, 412 U.S. 67, 75 (1973).

[42] See, *e.g.*, *United States* v. *Jacksonville Terminal Co.*, *supra*, 451 F.2d at 456; *United States* v. *Georgia Power Co.*, *supra*, 474 F.2d at 913; *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 221 (5th Cir. 1974); *Rogers* v. *International Paper Co.*, *supra*, 9 EPD at p. 6593; *Brito* v. *Zia Co.*, *supra*; *Young* v. *Edgcombe Steel Co.*, *supra*, 499 F.2d at 99.

[43] The EEOC Guidelines do not on their face necessarily apply to non-Title VII cases. See *Chance* v. *Board of Examiners*, *supra*, 458 F.2d at 1176-7. However, most courts follow them in such cases. See, *e.g.*, *Douglas* v. *Hampton*, *supra*, slip op. at 18; *Bridgeport Guardians, Inc.* v. *Civil Service Commission*, *supra*, 482 F.2d at 1337 n.6; *Vulcan Society* v. *Civil Service Commission*, *supra*, 490 F.2d at 394 n.8; *Commonwealth of Pennsylvania* v. *O'Neill*, *supra*, 348 F. Supp. at 1103; *Carter* v. *Gallagher*, 452 F.2d at 320, 326; *Western Addition Community Organization* v. *Alioto*, 340 F. Supp. 1351, 1353-4 (N.D. Cal. 1972); *Kirkland* v. *New York State Department of Correctional Services*, 374 F.Supp. 1361, 1370-1 (S.D.N.Y. 1974).

[44] See, *e.g.*, *United States* v. *Georgia Power Co.*, *supra*, 474 F.2d at 913, 915; *Rogers* v. *International Paper Co.*, *supra*, 9 EPD at p. 6592.

followed but may be applied consistently with other appropriate procedures. The Guidelines themselves provide for flexible application. They are "designed to serve as a workable set of standards," 29 C.F.R. § 1607.1(c), A. 307-8, and require only that

> empirical evidence in support of a test's validity must be based on studies employing generally accepted procedures for determining criterion-related validity such as those described in "Standards for Educational and Psychological Tests and Manuals" published by American Psychological Association [APA], 1200 17th Street, N.W., Washington, D.C. 20036. . . . (29 C.F.R. §1607.5(a), A. 311)

The Guidelines merely summarize the most important features of those "generally accepted procedures."

The Secretary of Labor has also published test validation guidelines applicable to federal contractors[45] very similar to the EEOC Guidelines (A. 321-8).[46] Like the EEOC Guidelines, the Secretary's guidelines adopt the APA Standards (see A. 325).[47] Those Standards (reprinted in pertinent part at A. 415-430) incorporate the judgment of the psychological profession (A. 172, 200) and

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[45] The Secretary's guidelines are issued pursuant to his enforcement responsibility under Executive Order 11246, 3 C.F.R. 339 (1965), prohibiting employment discrimination by federal contractors.

[46] "Testing and Selecting Employees by Government Contractors," 41 C.F.R. §§60-3.1 *et seq.* (1971), as amended January 17, 1974.

[47] American Psychological Association, "Standards for Educational and Psychological Tests and Manuals" (1966). Since entry of the decision below, the APA has revised its Standards with a 1974 edition. This revision is directed more specifically to employment tests and validation studies rather than educational examinations and manuals. Its principles are still consistent with the EEOC Guidelines. A copy has been filed with the clerk for reference by the Court.

are consistent with the two sets of Guidelines. In looking to the EEOC Guidelines, therefore, the Court of Appeals followed a broad consensus of informed opinion.[48]

Espinoza v. *Farah Manufacturing Co.*, 414 U.S. 86 (1973), does not imply a different result. The EEOC Guideline unsuccessfully advanced there attempted to define the scope of Title VII's basic proscription, *id.* at 92-4. In refusing to apply the Guideline, the Court had guidance from compelling indications of contrary Congressional purpose. *Espinoza* turned not on a matter within agency expertise but on "judicial application of canons of statutory construction," *Barlow* v. *Collins*, 397 U.S. 159, 166 (1970). In this case, the courts should welcome EEOC's expert technical assistance in defining validation procedures that carry out the statutory purpose articulated by *Griggs*.

The Court of Appeals' holding that Albemarle's validation study was inadequate to satisfy EEOC and professional standards (A. 516-520) is consistent with testimony by Dr. Richard Barrett that the study fell short of professional criteria set out in the APA Standards in a number of significant respects (A. 202-208).[49] The Court of Appeals centered its discussion of the validation study on two related faults: lack of job analysis and vague standards for rating job performance. Analysis of these shortcomings shows both how reasonable and sensible the EEOC Guidelines standards are, and how deficient the study was.

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[48] By contrast, in *Fishgold* v. *Sullivan Dry Dock & Repair Corp.*, 328 U.S. 275 (1946), on which Albemarle relies, the Court had to choose between two conflicting agency interpretations, 328 U.S. at 290. Moreover, the statute there construed had clear legislative history incompatible with the construction rejected by the Court, *id.*

[49] Dr. Richard Barrett is an industrial psychologist whose opinions this Court endorsed in *Griggs* (A. 197).

Dr. Tiffin made no analysis of job content for any of the jobs he studied (A. 174). No job descriptions had ever been developed at the mill (A. 148-9)[50] Both of plaintiffs' expert witnesses testified, without contradiction, that careful job analyses are crucial to *any* validation study (A. 371-2, 369, 200, 205). The EEOC Guidelines so provide, and specify that the analysis should identify "major or critical work behaviors," 29 C.F.R. § 1607.5(b)(3). Without an analysis, neither the test validator nor his raters know what aspect of job performance, or criterion, the test is supposed to measure, or does measure.[51] Plaintiffs' experts criticized the study for failing to meet this minimum standard (A. 386, 391, 206-7). The Fourth Circuit agreed (A. 517-18). In the importance attributed to the absence of job analysis, the court below has been joined by the Eighth

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[50] Albemarle implies that Dr. Tiffin knew the jobs at the Roanoke Rapids Mill because of his visits to other paper mills (Br. at 38). Without job descriptions, however, there was simply no proper way for Dr. Tiffin to rely on that assumption. Cf. 29 C.F.R. §1607.7 (A. 316).

[51] The 1966 APA Standards characterize definition of criterion measures "ESSENTIAL," and specify that such measures must relate to "significant aspects of performance," Standards, part C. 4 (A. 419-420). The 1974 Standards are even more explicit, see paragraphs E3, E3.1, E4, pp. 33-34. The Secretary of Labor's guidelines are to the same effect (A. 326). The professional literature also supports the necessity for criterion definition. See e.g., Byham & Spitzer, *The Law and Personnel Testing* (American Management Association, publisher) (1971), pp. 120-1; Cronbach, *Essentials of Psychological Testing*, New York: Harper & Row (1970), pp. 413-4; Guion, *Personnel Testing*, New York: McGraw-Hill (1965), pp. 116-21; Anastasi, *Psychological Testing*, London: MacMillan (3rd ed. 1968), pp. 417-9.

The arguments of Albemarle (Br. at 39-40) and amicus curiae ASPA (Br. at 22-24) that no job analysis or objective rating standard is necessary where ratings are on a "best overall employee" standard are superficial. See n. 53, *infra*. Their arguments might make more sense if "objective" performance criteria—such as production output—had been appropriately used. But the correlations in this case were based on a subjective criterion which was *not* shown to measure job performance accurately.

Circuit, which rejected another of Dr. Tiffin's studies in *Rogers* v. *International Paper Co., supra,* 9 EPD at p. 6593.

Lack of any job analysis was a major cause of the confusion prevalent among the supervisors who rated testees' job performance for validation purposes. Raters were given no meaningful criteria of performance. Dr. Tiffin testified that the ratings measured "job performance only, not personality, not attitude, those things were avoided in making the rating" (A. 166). He later defined this standard as meaning, "Excluding a man's attitude, just how well the guy can do the job when he's feeling right" (A. 175). Albemarle's personnel manager, who instructed the raters, told them to "determine which ones [employees] they felt irrespective of the job that they were actually doing, but in their respective jobs, did a better job than the person they were rating against" (A. 187). Given such amorphous rating standards, it is improbable that the ratings were closely tied to such critical performance criteria as would be identified by job analysis.

The EEOC Guidelines recognize the need for objective and job-related standards of employee performance as crucial to formulating any reliable validation procedure, 29 C.F.R. §1607.5(c)(3), (4). Absent such standards, founded on job analysis, there is no guarantee that the raters' criterion measurements are consistent or based on significant elements of the job.[52] The danger of "bias" in such ratings goes beyond the strictly racial dimension dis-

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[52] Our point is well summed up in two pithy statements from one of the leading texts on psychological testing, Guion, *Personnel Testing, supra:*

> It is not enough for a prediction to measure something reliably. What it measures must also be important (p. 51).
>
> Judgments make better criterion measures when they avoid glittering generalities and get down to specific behavior (p. 104).

cussed by Albemarle (Br. at 42). A supervisor comparing employees of the same race without the benefit of any pertinent criterion descriptions may unfairly rank the employees according to subjective or unimportant judgments.[53] For these reasons, the Fourth Circuit was properly unimpressed by Albemarle's correlation data based on such ratings (A. 517-8). The Eighth Circuit in *Rogers, supra,* 9 EPD at p. 6594, again agreed with this analysis. The ruling of both circuits is eminently sensible.

The Court of Appeals also rejected Albemarle's validation study because it purports, without justification, to approve testing practices much broader than those validated (A. 519-520). See p. 24, *supra.* The Court invalidated Albemarle's use of testing to screen all applicants for the "pool," regardless of what LOP they might later move into. Albemarle now criticizes this holding as based on an erroneous understanding of its test usage. However, the Court of Appeals based its holding on factual assertions in Albemarle's Brief on Appeal.[54] Moreover, the Court of

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[53] Different raters may well have different subjective perceptions of what is "best" (i.e. quantity or quality of output; attitude; regularity and dependability, etc.). The accuracy of their ratings will vary with their presumptions. Moreover, different jobs may require different answers which may not be forthcoming from raters with their own predilections. "Often a rating reflects the personal relation between man and supervisor rather than the quality of a man's work." Cronbach, *Essentials of Personnel Testing, supra,* p. 127.

[54] In its brief to the Fourth Circuit, Albemarle argued,

> Since Employer employs people originally into a pool or extra board from which the employee may move into any one of the lines of progression . . . it is not known at the time of hire into the pool in which line the employee will be placed. So there is nothing wrong with requiring him to be available for any line [by test qualifications]. Brief on Appeal at p. 32.

Here, however, Petitioner argues,

> Unless it is assumed that Albemarle is requiring satisfactory test scores as a condition of employment for all applicants for

Appeals correctly concluded that a purported test validation for some jobs would not support testing for different jobs in the absence of job analyses showing the two sets of jobs related in content or similarly dependent on criteria measured by the test, see EEOC Guidelines, 29 C.F.R. § 1607.4(c)(2) (A. 518-9).

C. Testing Should Be Enjoined.

Albemarle argues that its testing program should not have been enjoined even if it was properly held not demonstrably job-related (Br. at 47-50). The Company suggests that it should have another opportunity on remand to validate its tests properly; in the interim it would continue to use them to screen employees.

The Company's argument is based on the erroneous assertion that the Fourth Circuit's decision would allow "no further consideration" of Albemarle's testing program (Br. at 48). In fact, it is always open to employers to utilize employment tests in a manner which does not exclude blacks or to prove such tests job-related under proper standards. The real issue here is whether, when adverse impact is demonstrated and no test justification is shown, the employer may continue to utilize tests while attempting to validate them.

Griggs v. *Duke Power Co., supra,* teaches that, "[i]f an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited," 401 U.S. at 431, and places the burden of that showing on the test-user, *id.* at 432. Albemarle would have the Court reverse those principles. Since the

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the pool and thereby making the tests indirectly applicable to lines of progression for which the tests are not validated, there is no discrimination by reason of the tests. There is no evidence to support that assumption. . . . (Br. at 46).

Company has failed to show its tests job-related, they must be prohibited unless and until the proper demonstration is made.

The EEOC Guidelines narrowly define the conditions under which unvalidated tests may be temporarily used, 29 C.F.R. § 1607.9.[55] Albemarle makes no showing that it meets these conditions. It simply seeks license to continue to discriminate while continuing to litigate.[56]

The issue is one of timing. This case has been in litigation nearly a decade. Four years have passed since trial. Further proceedings may be anticipated. During this period, Albemarle should not be free to continue its testing program until it has met the burden of proving it lawful. To hold otherwise would make a generation of black employees casualties of litigation which their representatives might ultimately win, but too late to affect their employment careers.

II.

Back Pay Should Be Awarded Where Discriminatory Practices Cause Loss of Earnings and There Are No Special Circumstances Which Render the Award Unjust.

A. Back Pay Is an Appropriate Remedy in Title VII Class Actions.

The principal questions presented concerning class back pay are the proper standard for awarding that remedy,

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[55] In particular, the Guidelines require that some "substantial evidence of validity" have been presented and that further validation studies likely to produce the necessary additional data be in progress, 29 C.F.R. §1607.9(a), (b) (A. 316-7).

[56] An injunction pending further litigation as to validity is particularly appropriate in this case. The effect of Albemarle's presently-unvalidated testing is to perpetuate the exclusion of black employees from jobs that before 1965 were closed to them by overt discrimination.

and its application here. See arguments B, C, *infra*. At the threshold to these issues, defendants argue that district courts are not authorized to award back pay to non-plaintiff class members in any Title VII cases, and that back pay awards are individual in character. This position has been rejected by the lower courts and by Congress.

The plaintiff class consists of persons who because of the defendants' segregation practices were placed in lower-paying jobs than similarly situated white employees (see pp. 11-12, *supra*). These practices adversely affected the earnings opportunities of the class as a whole, *id.* A common remedy—back pay in the amount lost due to discrimination—is sought. The discriminatory actions and the appropriate relief are of precisely the type contemplated by the authors of amended Rule 23, F.R.Civ.P. See Advisory Committee's Note to Proposed Rules of Civil Procedure, 39 F.R.D. 69, 102 (1966); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 802 (4th Cir. 1971), *cert. dismissed* 404 U.S. 1006 (1971).

The lower courts have unanimously ruled that Title VII authorizes back pay to members of a plaintiff class. The Third,[57] Fourth,[58] Fifth,[59] Sixth,[60] Seventh,[61] and Eighth[62]

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[57] *Rosen* v. *Public Service Gas & Electric Co.*, 409 F.2d 775, 780 (3rd Cir. 1969), 477 F.2d 90, 95-6 (3rd Cir. 1973).

[58] *Robinson* v. *Lorillard Corp.*, *supra*, 444 F.2d at 802.

[59] *United States* v. *Georgia Power Co.*, *supra*, 474 F.2d at 919-21; *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1375-77 (5th Cir. 1974); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 256-7 (5th Cir. 1974); *Franks* v. *Bowman Transportation Co.*, 495 F.2d 398, 421-2 (5th Cir. 1974), *cert. denied* 42 L.Ed.2d 644 (1974); *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 436, 442-4 (5th Cir. 1974), *cert. denied* 42 L.Ed.2d 308 (1974); *Rodriguez* v. *East Texas Motor Freight Co.*, 505 F.2d 40, 64-5 (5th Cir. 1974).

[60] *Head* v. *Timken Roller Bearing Co.*, 486 F.2d 870, 876 (6th Cir. 1973); *Meadows* v. *Ford Motor Co.*, —— F.2d ——, 9 EPD

Circuits have so held. No circuit court has held to the contrary. District court decisions and consent decrees awarding class back pay are commonplace.[61]

The Equal Employment Opportunity Act of 1972, P.L. 92-261, 86 Stat. 103, modified Title VII's back pay provision, §706(g), 42 U.S.C. §2000e-5(g), and provoked extensive legislative debate about the availability of class-wide remedies. The legislative history of the 1972 amendment demonstrates Congress's specific approval of class remedies including back pay.

The 1972 Amendments originated in the House. The bill which passed the House, the "Erlenborn bill", H.R. 9247, specifically precluded class actions by providing that the court could,

> order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay . . . . *No order of the court shall require* the admission or reinstatement

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¶9907 (6th Cir. 1975); *EEOC* v. *Detroit Edison Co.*, —— F.2d —— (6th Cir. No. 74-1007, March 11, 1975), *aff'g in pert. part Stamps* v. *Detroit Edison Co.*, 365 F. Supp. 87 (E.D. Mich. 1973).

[61] *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711, 719-21 (7th Cir. 1969), 489 F.2d 896, 902-04 (7th Cir. 1973); *Sprogis* v. *United Air Lines, Inc.*, 444 F.2d 1194, 1201-2 (7th Cir. 1971), *cert. denied* 404 U.S. 991 (1971).

[62] *United States* v. *N. L. Industries, Inc.*, 479 F.2d 354, 378-9 (8th Cir. 1973).

[63] See, *e.g.*, decisions in *Laffey* v. *Northwest Airlines, Inc.*, 7 EPD ¶9277 (D. D.C. 1974), *entering order following* 366 F. Supp. 763 (D. D.C. 1973); *Russell* v. *American Tobacco Co.*, 374 F. Supp. 286, 300 (M.D. N.C. 1973); *Cooper* v. *Philip Morris, Inc.*, 9 EPD ¶9929 (W.D. Ky. 1974); *Myers* v. *Gilman Paper Co.*, 9 EPD ¶9920 (S.D. Ga. 1975); *Bush* v. *Lone Star Steel Corp.*, 373 F. Supp. 526, 536 (E.D. Tex. 1973); *Patterson* v. *American Tobacco Co.*, 8 EPD ¶9722 (E.D. Va. 1974); and consent decrees cited at p. 57, n.120, *infra*.

> of an individual . . . or *the payment to him of any back pay, if such individual . . . neither filed a charge nor was named in a charge or amendment thereto. . . .* (emphasis supplied)[64]

Senator Williams introduced a bill in the Senate, S.2515, which did not place any such restriction on class actions.[65] The Senate Committee on Labor and Public Welfare reported out the Williams bill on October 28, 1971 with recommendation that it pass, 117 Cong. Rec. 38030.[66] The Committee Report on Section 706(d) of the bill (dealing with EEOC Commissioners' charges) states:

> *This section is not intended in any way to restrict the filing of class complaints.* The committee agrees with the courts that Title VII actions are by their very nature class complaints,[16] and that *any restriction on such actions would greatly undermine the effectiveness of Title VII. S.Rep.* 415 at 27, 92nd Cong. 1st Sess. (1971) (emphasis supplied.)[67]

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[64] Two different bills were introduced in the House, early in 1971, the "Hawkins" bill, H.R. 1746, and the "Erlenborn" bill, 117 Cong. Rec. 212, 20622. The Hawkins bill did not contain any language restricting class action remedies.

[65] Senator Dominick introduced as S.2617 the Erlenborn bill which had been passed in the House, 117 Cong. Rec. 34104. There S.2617 was debated as an alternative to the Williams bill.

[66] The same Committee also reported out the Erlenborn language, in the Dominick bill (S.2617), but without recommendation for passage, 117 Cong. Rec. 38030.

[67] Note 16 cited, *inter alia*, *Oatis* v. *Crown-Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968), and *Local 186, International Brotherhood of Pulp, Sulphite & Paper Mill Workers* v. *Minnesota Mining and Manufacturing Co.*, 304 F. Supp. 1284 (N.D. Ind. 1969). In *Oatis*, the court held that class members need not have filed EEOC charges in order to participate as co-plaintiffs so long as one class representative had so filed and the other class members assert common issues, 398 F.2d at 499.

Similarly, Senator Williams placed in the record a Section-by-Section Analysis explaining the changes later made in his bill on the floor.[48] The analysis of §706(f)(1) (authorizing EEOC to sue in district court to enforce Title VII) states:

> In establishing the enforcement provisions under this subsection and subsection 706(f) generally, *it is not intended that any of the provisions contained therein are designed to affect the present use of class action lawsuits under Title VII in conjunction with Rule 23 of the Federal Rules of Civil Procedure.* The courts have been particularly cognizant of the fact that claims under Title VII involve the vindication of a major public interest, and that any action under the Act involves considerations beyond those raised by the individual claimant. As a consequence, the leading cases in this area to date have recognized that Title VII claims are necessarily class complaints and that, accordingly, *it is not necessary that each individual entitled to relief under the claim be named in the original charge or in the claim for relief.* 118 Cong. Rec. 4942 (1972) (emphasis supplied)

The Williams bill thereupon passed the Senate, 118 Cong. Rec. 4944 (1972).

In reconciling S.2515 with H.R. 1746 the Conference Committee adopted the Senate position on class actions. The Section-by-Section Analysis of the Committee's agreement recites the language quoted just above in its entirety and adds: "A provision limiting class actions was con-

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[48] A compromise between Senators Dominick and Williams on other contested provisions led to the substitution of an amendment by Senator Dominick (No. 884, 118 Cong. Rec. 3808 (1972)), which replaced the pertinent provisions of the Williams bill, but which did not add any restrictions on class actions.

tained in the House Bill and specifically rejected by the Conference Committee," 118 Cong. Rec. 7168, 7565 (1972).[69] Both chambers accepted this compromise bill, 118 Cong. Rec. 7170, 7573 (1972).

The back pay issue was in the forefront during Congress's consideration of class remedies under §706(g). Thus, Rep. Erlenborn on September 15, 1971 justified his limiting language by asserting that it would diminish unwanted back pay exposure.[70] Rep. Abzug, arguing in opposition to the Erlenborn limitation, also stressed the importance of the monetary award to effective class relief.[71] Moreover, the Senate Committee that eliminated the Erlenborn language cited with approval a class back pay case,

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[69] The Analysis also provides that,

> In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII. 118 Cong. Rec. 7168, 7565 (1972).

By this time, the Courts of Appeals had clearly indicated that class back pay awards are appropriate. See n.84, *infra*.

[70] "*We have class actions* where the Commission admittedly encourages individual complainants to file suit on their own behalf and *for the entire class that may be similarly affected. This,* plus the liability of backpay without limitation, *would create an horrendous potential liability.* We would provide a limitation on liability through a 2-year statute of limitations . . . .

> *We would also provide in the class action a limitation so that those who join in the class action or those who by timely motion to intervene could be considered as the proper class, but not all who may be similarly situated* but who are not even aware of the fact that a case has been filed . . . ." 117 Cong. Rec. 31973-4 (1971) (emphasis supplied).

[71] "The structure and pattern of employment discrimination will remain untouched unless large numbers of workers are affected. An award in favor of one complainant will do little to discourage an employer bent on discriminating against a class of employees, but an award—or even the possibility of an award—on behalf of an entire class can effectively discourage this kind of unlawful discrimination." 117 Cong. Rec. 32097 (1971).

Local 186, International Brotherhood of Pulp, Sulphite & Paper Mill Workers v. *Minnesota Mining and Manufacturing Co.*, 304 F. Supp. 1284, 1285, 1295 (N.D. Ind. 1969), see n. 67, *supra*.

In the face of this explicit legislative history, Albemarle and Local 425 argue that class-wide monetary relief is impermissible because it conflicts with Title VII's policy favoring conciliation of complaints (Co. Br. at 63, U. Br. at 31-33). Defendants both ignore the plain history, *supra*, and distort the Congressional intent when they elevate preference for conciliation to a remedial bar.

Although in enacting Title VII Congress hoped to facilitate the informal resolution of complaints through conciliation, the courts have consistently held that actual conciliation of EEOC complaints is not a prerequisite to suit under Title VII.[72] The Congressional purpose is fulfilled by requiring the charging party to file a complaint with EEOC and directing EEOC to serve the complaint on the respondent and offer its conciliation services, 42 U.S.C. §2000e-5(b).[73] An EEOC charge filed by an individual, which complains of practices of discrimination, satisfies Congress's intention of providing an opportunity for conciliation and, therefore, provides the basis for a Title VII class action, for the reasons set forth by the Fifth Circuit:

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[72] *Johnson* v. *Seaboard Air Line Railroad Co.*, 405 F.2d 645, 648-53 (4th Cir. 1968), *cert. denied* 394 U.S. 918 (1969); *Dent* v. *St. Louis-San Francisco Railway Co.*, 406 F.2d 399, 402-3 (5th Cir. 1969), *cert. denied* 403 U.S. 912 (1971).

[73] After filing his charge and allowing the conciliation period to run, the charging party need only receive a "right to sue" letter from EEOC in order to initiate suit under Title VII. 42 U.S.C. §2000e-5(f)(1); *McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792, 798-9 (1973); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44-5 (1974).

> It would be wasteful, if not vain, for numerous employees, all with the same grievance, to have to process many identical complaints with the EEOC. . . .
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> • • • • •
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> Racial discrimination is by definition class discrimination, and to require a multiplicity of separate, identical charges before the EEOC, filed against the same employer, as a prerequisite to relief through resort to the court would tend to frustrate our system of justice and order.[74]

Albemarle and Local 425 offer no evidence in support of their hypothesis that allowing class back pay would hinder conciliation. Both reason and experience refute that assertion, see pp. 57-59, *infra*. In any event, Congress has spoken clearly to their point, and explicity rejected it.[75]

Albemarle also argues that the class back pay remedy improperly extends the federal jurisdiction (Br. 62, 66). It relies on two diversity decisions, *Snyder* v. *Harris*, 394 U.S. 332 (1969), and *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973), that turn on the meaning of the "amount in controversy" requirement, 28 U.S.C. §1332(a). These cases have no bearing on a case brought under federal civil rights jurisdiction, 28 U.S.C. §1343. Respondents have met all the

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[74] *Oatis* v. *Crown-Zellerbach Corp.*, *supra*, 398 F.2d at 498. *Accord: Bowe* v. *Colgate-Palmolive Co.*, *supra*, 416 F.2d at 720. These remarks are particularly compelling in light of EEOC's huge and growing backlog of complaints, which already seriously interferes with its conciliation function.

Furthermore, despite its preference for conciliation, Congress intended that the ultimate responsibility for enforcing Title VII would repose in the courts and that the judicial remedy should be prompt and efficacious, 42 U.S.C. §2000e-5(f)(4), (5), *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 36 (1974).

[75] At least after the 1972 legislative activity, class back pay cannot fairly be labelled a "court-made rule" (cf. Co. Br. 63).

requirements of Title VII jurisdiction, 42 U.S.C. §2000e-5(f)(1), see n. 73, *supra* (A. 475).[76]

This Court should confirm the judgment of six circuits that class back pay is available in an appropriate Title VII action.

B. A Standard Directing District Courts to Exercise Their Discretion to Award Back Pay Unless There Are Special Circumstances Which Make the Award Unjust Is Appropriate in Light of the Clear Statutory Purpose of Title VII.

The district court denied back pay to black workers despite finding that the defendants' discriminatory practices relegated blacks to the lower-paying jobs and denied them equal promotional opportunity. The district court in denying back pay under these circumstances ruled as if the statutory purposes of Title VII placed no constraints on the exercise of its discretion to deny back pay. The Fourth Circuit, however, enunciated and applied a standard based on the purpose of the applicable statutory provisions.

> Thus, a plaintiff or a complaining class who is successful in obtaining an injunction under Title VII of the Act should ordinarily be awarded back pay unless special circumstances would render such an award unjust.

474 F. 2d at 142; A. 524. The Fifth[77] and Sixth[78] Circuits

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[76] *Cf. Sosna* v. *Iowa*, 42 L.Ed.2d 532, 549 n.1 (1975), Mr. Justice White, dissenting.

[77] *Johnson* v. *Goodyear Tire & Rubber Co.*, *supra*, 491 F.2d at 1375; *Pettway* v. *American Cast Iron Pipe Co.*, *supra*, 494 F.2d at 251; *Franks* v. *Bowman Transportation Co.*, *supra*, 495 F.2d at 421; *Baxter* v. *Savannah Sugar Refining Corp.*, *supra*, 495 at 442-43; see *United States* v. *Hayes International Corp.*, 456 F.2d 112, 121 (5th Cir. 1972).

[78] *Head* v. *Timken Roller Bearing Co.*, *supra*, 486 F.2d at 876; *Meadows* v. *Ford Motor Company*, —— F.2d ——, 9 EPD ¶9907 (6th Cir. 1975) at pp. 6766-7.

have adopted the same standard as the Fourth, while the Third[79] and Seventh[80] Circuits have expressly stated that back pay should normal'y be awarded to Title VII plaintiffs who suffer economic loss as a result of discriminatory practices.[81]

The standards established by the Fourth, Fifth, and Sixth Circuits serve the important function of ensuring that the Congressional purpose embodied in Title VII is implemented by the district courts. It is clearly appropriate, as the Fourth Circuit stated, that

> in determining the proper scope of the exercise of discretion, the objective sought to be accomplished by the statute must be given great weight. *Hecht Co.* v.

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[79] *Rosen* v. *Public Service Electric and Gas Company, supra,* 477 F.2d at 96; *Jurinko* v. *Wiegand Co.,* 477 F.2d 1036, 1046 (3rd Cir. 1973), vacated on other grounds, 414 U.S. 970 (1973), reinstated 497 F.2d 403 (3rd Cir. 1974).

[80] *Bowe* v. *Colgate-Palmolive Company, supra,* 416 F.2d at 720; *Sprogis* v. *United Air Lines, Inc., supra,* 444 F.2d at 1201-02.

[81] The Eighth Circuit has stated that awards of back pay are important in order to eliminate "the last vestiges of an unfortunate and ignominious page [employment discrimination] in this country's history." *United States* v. *N. L. Industries,* 479 F.2d 354, 379 (8th Cir. 1973). However, the Eighth Circuit further stated that,

> [d]espite what we have said as to the *appropriateness* of back pay, we do not make such an award here. In this Circuit the law in regard to back pay has not been adequately defined to provide employers and unions with notice that they will be liable for a discriminatee's economic losses. . . . (emphasis added)

Id., 479 F.2d at 380; see also *Norman* v. *Missouri Pacific Railroad,* 497 F.2d 594, 597 (8th Cir. 1974), *cert. denied* 43 LW 3416 (1975), but see *United States* v. *St. Louis-San Francisco Ry. Co.,* 464 F.2d 301 (8th Cir. *en banc* 1972), *cert. denied* 409 U.S. 1107 (1973).

Even accepting the Eighth Circuit's description of the state of the law as "unsettled," the denial of back pay for that reason was clearly improper in light of this Court's statement that "a court is to apply the law in effect at the time it renders its decision . . . ." *Bradley* v. *Richmond School Board,* 416 U.S. 696, 714 (1974).

> *Bowles*, 321 U.S. 321, 331, . . . Where a district court fails to exercise discretion with an eye to the purposes of the Act, it must be reversed. *Wirtz* v. *B.B. Saxon Co.*, 365 F.2d 457 (5th Cir. 1966), *Shultz* v. *Parke*, 413 F.2d 1364 (5th Cir. 1969). 474 F. 2d at 141-2 (A. 523).[82]

The Fourth Circuit concluded that a "clear purpose" of Title VII is to compensate workers for economic loss suffered as a result of unlawful employment practices. This conclusion is fully supported by judicial authority and the legislative history. It would be anomalous if Congress outlawed discrimination in employment without intending full relief for those who suffered from discrimination. Cf. *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965). The decisions of the Courts of Appeals have unanimously held that compensation for economic harm is a fundamental part of Title VII's purpose.[83] Moreover, Congress in reviewing the remedy of back pay during the process of amending Title VII in 1972, ratified the interpretation of the Courts of Appeals which had held that back pay was

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[82] See *Mitchell* v. *Robert de Mario Jewelry, Inc.*, 361 U.S. 288, 291-2 (1960), discussed *infra* at pp. 52-53.

[83] See *e.g.*, *United States* v. *Georgia Power Company*, *supra*, 474 F.2d at 921:

> Given this Court's holding that '[a]n inextricable part of the restoration to prior [or lawful] status is the payment of back wages . . . it becomes apparent that this form of relief may not properly be viewed as a mere adjunct of some more basic equity. It is properly viewed as an integral part of the whole of relief . . .

Rosen v. *Public Service Electric and Gas Company*, *supra*, 477 F.2d at 96; *Pettway* v. *American Cast Iron Pipe Co.*, *supra*, 494 F.2d at 252; *Head* v. *Timken Roller Bearing Company*, *supra*, 486 F.2d at 876; see *United States* v. *N. L. Industries*, *supra*, 479 F.2d at 379; see also *Pettit* v. *United States*, 488 F.2d 1026, 1031-2 (U.S. Ct. Cls. 1973); *Mize* v. *State Division of Human Rights*, 33 N.Y.2d 53, 56, 349 N.Y.S.2d 364, 366 (N.Y. Ct. of Appeals, 1973).

an integral part of the relief which Congress intended.[84] Congress considered several questions concerning back pay in 1972; specifically, Congress considered amendments proposing to bar back pay in class actions,[85] to require a jury trial for Title VII cases involving back pay,[86] and to impose a restrictive statute of limitations.[87] In approving class actions, rejecting jury trials, and selecting a more liberal statue of limitations Congress showed a consistent purpose to make Title VII's remedial provisions, particularly back pay, apply broadly to afford relief from discrimination.[88]

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[84] *Bowe* v. *Colgate-Palmolive Company*, 416 F.2d 711, 720 (7th Cir. 1969); *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 802-04 (4th Cir. 1971), *cert. dismissed* 404 U.S. 1006 (1971); *Sprogis* v. *United Air Lines, Inc.*, 444 F.2d 1194, 1202 (7th Cir. 1971), *cert. denied* 404 U.S. 991 (1971).

[85] See pp. 37-40, *supra*.

[86] The Senate rejected Amendment No. 908, introduced by Senator Ervin, which would have required a jury trial in Title VII cases. 118 Cong. Rec. 4917, 4919-20 (1972) (remarks of Senators Ervin and Javits).

[87] The Erlenborn bill, H.R. 1746, which passed the House, had contained a provision, section 3(e), limiting back pay liability to two years before the filing of the complaint in court. The Williams Bill, S.2515, which passed the Senate contained a provision limiting liability to a period no longer than two years prior to a filing of a *charge with the EEOC*. See S.2515, §706(g)(2); 118 Cong. Rec. 4942 (1972) (explanation by Senator Williams). The Conference Committee adopted the more liberal Senate provision. 118 Cong. Rec. 7168 (1972) (Section-by-Section Analysis of the Conference Committe). See 42 U.S.C. §2000e-5(g).

[88] While Title VII did not previously have a specific statute of limitations, courts could in their discretion look to state statutes of limitations and other factors in determining the appropriate limits for back pay liability. Congress in specifying a liberal statute of limitation, which is tolled by the filing of an administrative charge rather than a later judicial complaint, provided for substantial back pay awards. See Sape and Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 882-83 (1972).

The Conference Commitee in its Section-by-Section Analysis made it patently clear that §706(g) was designed to afford full relief.

> The provisions of this subsection are intended to give the courts *wide discretion exercising their equitable powers to fashion the most complete relief possible.* In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of *the Act is intended to make the victims of unlawful discrimination whole,* and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination (emphasis supplied). 118 Cong. Rec. 7168 (1972); see also 118 Cong. Rec. 4942 (1972) (Section-by-Section Analysis introduced into Record by Sen. Williams).

Defendants' argument that the discretion of the district courts may be used arbitrarily to deny "the most complete relief possible" from the economic effects of discrimination is therefore directly contrary to Congress' express purpose. That purpose would be frustrated if district courts could, as a matter of discretion, contravene the Congressional intent by ruling that back pay is not an essential part of relief. Rather, the statutory purpose requires,

> that where employment discrimination has been clearly demonstrated . . . victims of that discrimination must be compensated if financial loss can be established. . . . To implement the purposes behind Title VII, a court should give 'a wide scope to the act in order to

> remedy, as much as possible, the plight of persons who have suffered from discrimination in employment opportunities'. (footnote omitted)

Johnson v. *Goodyear Tire & Rubber Co., supra,* 491 F.2d at 1375.[89]

A similar Congressional purpose underlies the award of back pay to victims of unlawful employment practices under the National Labor Relations Act, U.S.C. §§151 et seq. The NLRA back pay remedy is particularly pertinent to the construction of the Title VII provision. As the similarity in language between the remedial sections of the two statutes would suggest,[90] the legislative history of Title VII plainly indicates that the NLRA back pay remedy served as a model for drafting Title VII.[91]

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[89] See cases cited in nn.83, 84, *supra.*

[90] Section 10(c) of the NLRA, 29 U.S.C. §160(c) authorizes "affirmative action including reinstatement of employees *with or without* back pay . . ." (emphasis added); Section 706(g) of Title VII, 42 U.S.C. §2000e-5(g) is closely parallel, authorizing "such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, *with or without* back pay. . . ." (emphasis added).

[91] On March 30, 1964 Senator Humphrey, one of the principal sponsors of the bill, stated that:

> The relief sought in such a suit would be an injunction against future acts or practices of discrimination, but the court could order appropriate affirmative relief, such as hiring or reinstatement of employees and the payment of back pay. This relief is similar to that available under the National Labor Relations Act. . . .

110 Cong. Rec. 6549 (1964). See also 110 Cong. Rec. 7214 (1964) (Interpretative Memorandum placed into the Record by Senators Clark and Case); H.R. Rep. No. 914, 88th Cong. 1st Sess. 112 (1963); see *United States* v. *Georgia Power Company, supra,* 474 F.2d at 921 n.19; *Pettway* v. *American Cast Iron Pipe Company, supra,* 494 F.2d at 252; *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1974,*

Beginning with *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177 (1941), this court has emphasized the importance of back pay in cases brought pursuant to the NLRA. While *Phelps* decided several important questions concerning the application of the NLRA, it involved only a narrow computational issue concerning back pay.[92] The Court in *Phelps* stressed the importance of back pay awards even though the propriety of such award was not directly at issue:

> Making the workers whole for losses suffered on account of an unfair labor practice is a part of the vindication of the public policy which the Board enforces.

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84 HARV. L. REV. 1109, 1259 n.349 (1971); Davidson, *"Back Pay" Awards Under Title VII of the Civil Rights Act of 1964*, 26 RUTGERS L. REV. 741, 742-43 (1973). See also n.92, *infra*.

[92] The NLRB had ordered back pay to specific workers equal to what they would have earned absent the unlawful conduct of the company less their actual earnings. The Second Circuit modified the formula for calculating back pay by deducting earnings which the workers "failed without excuse to earn".

The NLRB appealed the modification of its formula for calculating back pay because it argued that the Second Circuit's formula would create administrative difficulties. The Supreme Court rejected the Board's arguments stating that there need not be "stereotyped formulas" for computing back pay and that the Board has discretion to derive formulas which will "attain just results in diverse situations." *Phelps Dodge Corp.* v. *NLRB, supra* at 198.

The defendants inappropriately rely on this language in support of their position that district courts have practically unfettered discretion to *deny* back pay. Co. Br. at 52; U. Br. at 28; see also the dissenting opinion of Judge Boreman, 474 F.2d at 145 (A. 529-30).

It should be noted that Congress in structuring the Title VII back pay provision on the NLRA provision incorporated NLRA case law concerning the calculation of back pay awards, as first expressed in *Phelps*, into §706(g) of Title VII, 42 U.S.C. §2000e-5(g):

> Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

Id. at 197-98.[93] The Supreme Court has consistently adhered to this principle,[94] and the Courts of Appeals[95] and the NLRB[96] have consistently applied it.[97]

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[93] Moreover, the actual holding of the Court in *Phelps* reversed the exercise of discretion by the NLRB in calculating the amount of the back pay award. This ruling directly supports the Fourth Circuit's decision that the discretionary rulings of the district court may not be upheld if they are contrary to the purposes of the statute.

[94] See e.g., *Nathanson* v. *NLRB*, 344 U.S. 25, 27 (1952); *NLRB* v. *Seven Up Bottling Co.*, 344 U.S. 344, 347 (1953); *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 278 (1956); *NLRB* v. *Rutter-Rex Manufacturing Co.*, 396 U.S. 258, 263 (1969).

[95] See e.g., *NLRB* v. *Mastro Plastics Corp.*, 354 F.2d 170, 178 (2nd Cir. 1965) *cert. denied* 384 U.S. 972 (1966); *Buncher* v. *NLRB*, 405 F.2d 787, 790-91 (3rd Cir. *en banc* 1969), *cert. denied* 396 U.S. 828 (1969); *NLRB* v. *International Union of Operating Engineers, Local 925*, 460 F.2d 589, 599 (5th Cir. 1972); *Bon Hennings Logging Company* v. *NLRB*, 308 F.2d 548, 555-56 (9th Cir. 1962); *NLRB* v. *Rice Lake Creamery Co.*, 365 F.2d 888, 891 (D.C. Cir. 1966).

[96] The NLRB policy of routinely awarding back pay has been consistently followed. In its very first published order, the Board awarded back pay, *Pennsylvania Greyhound Lines, Inc.*, 1 NLRB 1, 51 (1935), *enf'd sub nom. NLRB* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261 (1938). From the first, the Board envisaged the "development of a practically uniform policy with respect to these orders requiring affirmative action." NLRB Annual Report, Vol. 1 (1936), p. 124. That policy has been that, "in all but a few cases involving discriminatory discharges, discriminatory refusals to employ or reinstate, or discriminatory demotions in violation of Section 8, subdivision (3), of the Act, the Board has ordered the employer to offer reinstatement to the employee discriminated against and to make whole such employee for any loss of pay he has suffered by reason of the discrimination." NLRB Annual Report, Vol. 2 (1937), p. 148. See also *N.L.R.B.* v. *A.P.W. Products Co.*, 316 F.2d 899, 904-905 (2nd Cir. 1963). *enf'ing* 137 NLRB 25 (1962).

[97] The broad application of "back pay" under the NLRA is particularly significant because, "if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it," Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COL. L. REV. 527, 537 (1947).

Albemarle argues that Congress altered its original intention to model the Title VII back pay provision after the NLRA when it passed an amendment introduced by Senator Dirksen (Br. 52).[98] Congress' clear intent to base the Title VII remedy on the NLRA remedial provision was in no way affected by the Dirksen amendment. Section 706(e) of H.R. 7152, the predecessor of Title VII's §706(g) provided as follows:

> If the court finds that the respondent has engaged in or is engaging in an unlawful employment practice charged in the complaint the court may enjoin the respondent from engaging in such unlawful employment practices, and *shall* order the respondent to take such affirmative action, including reinstatement or hiring of employees, with or without back pay . . . as may be appropriate. (emphasis added)

110 Cong. Rec. 12814 (1964). The Dirksen amendment, in substance, simply changed the "shall", emphasized above, to "may".[99] Since the bill had already contained the provisions "with or without back pay" and "as may be appropriate",[100] the change of "shall" to "may" was, as Senator Humphrey explicitly stated, "a minor language change" which simply clarified the statute.[101]

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[98] Substitute amendment No. 656; see 110 Cong. Rec. 12807-20 (1964).

[99] 110 Cong. Rec. 12814 (1964); see 110 Cong. Rec. 12819 (1964).

[100] These provisions were, of course, in the bill when Senators Case, Clark and Humphrey stated that the back pay remedy was modelled on the NLRA, see footnote 91, *supra*. Also the sponsors of Title VII did not talk in mandatory terms, but rather stated that back pay "could" be awarded.

[101] 110 Cong. Rec. 12723-24 (1964) (remarks of Senator Humphrey).

The Court's implementation of the Fair Labor Standards Act of 1938, 29 U.S.C. §201 *et seq.*, provides further guidance as to the purposeful exercise of discretion by the federal courts in designing remedies for violations of Title VII. In *Mitchell* v. *Robert de Mario Jewelry, Inc.*, 361 U.S. 288 (1960), the district court, relying on its discretion, had denied compensatory relief to employees who had been unlawfully discharged.[102] In reversing a Court of Appeals affirmance Mr. Justice Harlan first reviewed the purpose which should guide the use of equitable discretion by the federal courts:

> When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes. As this Court long ago recognized, 'there is inherent in the Courts of Equity a jurisdiction to . . . give effect to the policy of the legislature'. 361 U.S. at 291-92 (citations omitted)

Justice Harlan then concluded that "because of what we have found to be the statuory purposes there is doubtless little room for the exercise of discretion not to order reimbursement," 361 U.S. at 296.[103] That case is espe-

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[102] The Company discharged several employees because they filed complaints with the Secretary of Labor. This discharge violated 29 U.S.C. §215(a)(3). See *Mitchell* v. *Robert De Mario Jewelry, Inc.*, 260 F.2d 929, 930 (5th Cir. 1958).

[103] See *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 397-99 (1946) (this opinion is relied on by the Court in *Mitchell* v. *Robert de Mario Jewelry, Inc., supra*).

The Supreme Court has similarly directed that the discretion of the federal courts in enforcing the Securities Exchange Act of 1934, 15 U.S.C. §§77b *et seq.* should be exercised towards providing full and complete relief from violations and towards effectuating the public policy of the Act. *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 433-34 (1964).

cially compelling here, since the pertinent FLSA provision did not even specifically authorize back pay,[104] as Section 706(g) of Title VII does.

In addition to insuring that the district courts properly implement the Congressional purpose expressed in Title VII, the standard established by the Fourth Circuit implements another essential function: to insure that the decisions of the district courts within the circuit are consistent. If the Court of Appeals did not establish a general guide for the district courts to follow in exercising their discretion then cases arising within the same jurisdiction on all but identical facts could lead to opposite results, as they did before the enunciation of standards by the Fourth, Fifth and Sixth Circuits. Judge Craven properly phrased this problem:

> The question then is whether, in light of the broad aims of Title VII, this Court may affirm the opposite result as to back pay on similar factual situations because such award rests in the discretion of the district judge. 474 F.2d at 141 (A. 522)

The standards established by the Fourth, Fifth and Sixth Circuits serve to eliminate fundamentally inconsistent applications of Title VII.[105] The standards of the Fourth,

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[104] 29 U.S.C. §217, §17 of the Fair Labor Standards Act of 1938, provides only for prohibitory injunctive relief.

[105] A dramatic example of such a fundamental inconsistency of judicial application is demonstrated by comparing the district courts' opinions in the instant case and in *Robinson* v. *Lorillard Corp., supra, aff'g* 319 F.Supp. 835 (M.D. N.C. 1970). These two cases presented startlingly similar issues of fact and law. In both cases a principal issue was the departmental seniority system which perpetuated the discriminatory effects of the past segregated job assignments. Both cases also presented closely analogous defenses of "good faith" and "waiver" by plaintiffs. In this case the district court accepted those defenses, whereas the dis-

Fifth, and Sixth Circuits quite properly direct district courts to implement Title VII consistently with the purpose and policy Congress intended. The standards do not, in any sense, remove all discretion from the district courts. The district courts retain discretion to avoid unjust results,[106] to fashion remedies which effectively terminate discriminatory practices and their effects,[107] and to select the most efficient and equitable remedies.[108]

As an example of proper discretion, Judge Craven indicated that an award of back pay in cases involving female protective law statutes would be unjust, 474 F.2d at 142 (A. 524).[109] The Courts of Appeals have held that these statutes are invalid under Title VII but have denied both

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trict court in *Robinson* awarded back pay after specifically rejecting the two defenses.

Similar inconsistent decisions were rendered by district courts in the Fifth and Sixth Circuits before those Circuits established standards guiding the exercise of discretion. Compare *Bush* v. *Lone Star Steel Corporation*, 373 F.Supp. 526, 536-37 (E.D. Tex. 1973), with *Johnson* v. *Goodyear Tire & Rubber Company*, 349 F.Supp. 3 (S.D.Tex. 1972), *rev'd* 491 F.2d 1364 (5th Cir. 1974); compare *United States* v. *Bricklayers, Local No. 1*, 5 EPD ¶8480 (W.D. Tenn. 1973), *aff'd sub nom United States* v. *Masonry Contractors Ass'n of Memphis, Inc.*, 497 F.2d 871 (6th Cir. 1974), with *Head* v. *Timken Roller Bearing Company*, 6 EPD ¶8679 (S.D. Ohio 1972), *rev'd* 486 F.2d 870 (6th Cir. 1973).

[106] See, e.g., 474 F.2d at 142, A. 523-4.

[107] *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965); *Green* v. *School Board of New Kent County*, 391 U.S. 430, 439 (1968); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15, 21 (1971).

[108] See pp. 55-56, *infra*.

[109] The factual patterns in all these cases are similar. Prior to the application of Title VII many states had female protective laws which limited the employment conditions of women, such as the hours that women might work. Consequently, an employer's adherence to these mandatory statutes resulted in reduced employment opportunity and wages for women.

injunctive relief and back pay.[110] The rationale for the denial of all relief—apart from a declaration that the protective law is invalid—is the established principle that state statutes are entitled to the presumption of validity until there has been a judicial declaration to the contrary. See e.g., *Davies Warehouse Co.* v. *Bowles*, 321 U.S. 144, 153 (1944).[111] The Fourth Circuit has also recognized that district courts under the *Moody* standard would have discretion to deny back pay in other circumstances in order to avoid an unjust result. See e.g., *Lea* v. *Cone Mills Corp.*, 301 F.Supp. 97, 102 (M.D.N.C. 1969), *aff'd in pertinent part* 438 F.2d 86 (4th Cir. 1971); *Roberts* v. *Hermitage Cotton Mills, Inc.*, 8 EPD ¶9589 (D.S.C. 1973), *aff'd* 498 F.2d 1397 (4th Cir. 1974).

Moreover, the district courts have the discretion, and this is the heart of equitable discretion, to formulate relief that will both effectively remedy violations of Title VII and apply fairly to the pertinent employment system.[112] District courts properly exercise their discretion when they seek to insure both an effective remedy and an equitable

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[110] *Kober* v. *Westinghouse Electric Corporation*, 480 F.2d 240 (3rd Cir. 1973); *Le Blanc* v. *Southern Bell Telephone and Telegraph Co.*, 460 F.2d 1228 (5th Cir. 1972), *cert. denied* 409 U.S. 990 (1972); *Manning* v. *General Motors Corp.*, 466 F.2d 812 (6th Cir. 1972), *cert. denied* 409 U.S. 1086 (1973); *Rosenfeld* v. *Southern Pacific Company*, 444 F.2d 1219 (9th Cir. 1971); but see *Schaeffer* v. *San Diego Yellow Cabs, Inc.*, 462 F.2d 1002 (9th Cir. 1972).

[111] Clearly, "good faith" reliance on a state protective law statute is fundamentally different from the assertions of "good faith" made by the defendants. Therefore, it is inapposite for the defendants to rely on *Kober* v. *Westinghouse Electric Corporation, supra*, a typical female protective law case. Co. Br. at 54 n.56, 61 n.67; U. Br. at 19, 31. See n.126, *infra*.

[112] See *Int'l Ass'n of Heat, Frost & Asbestos Workers Local 53* v. *Vogler*, 407 F.2d 1047, 1052-53 (5th Cir. 1969); *Vogler* v. *McCarty, Inc.*, 451 F.2d 1236, 1238 (5th Cir. 1971); *United States* v. *Ironworkers Local 86*, 443 F.2d 544, 553 (9th Cir. 1971) *cert. denied* 404 U.S. 984 (1971).

result for all the concerned employees and parties. Accordingly, courts may in some situations apply prospective compensatory relief rather than injunctive relief,[113] or compensatory training programs,[114] or particular rather than general revisions in the seniority system.[115] Lastly, district courts have broad discretion to determine appropriate methods for the calculation of earnings lost as a result of discrimination,[116] and to allocate back pay liability among the defendants.[117]

The Fourth Circuit's standard which properly guides the district courts toward fair results does not, as defendants contend, conflict with the decision in *Curtis* v. *Loether*, 415 U.S. 189 (1974), (Co. Br. at 26, 53; U. Br. at 19, 23, 25). The issue in *Curtis* was whether the Seventh Amendment required a jury trial for an award of monetary relief pursuant to §812 of the Civil Rights Act of 1968, 42 U.S.C. §3612. The Court distinguished lower court decisions that a jury trial was not required by the back pay remedy of Title VII by stating, *inter alia*, that "the deci-

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[113] See e.g., Note, *Title VII, Seniority Discrimination and the Incumbent Negro*, 80 HARV. L. REV. 1260, 1281-2 (1967); *United States* v. *United States Steel Corporation*, 371 F. Supp. 1045, 1060 (N.D. Ala. 1973).

[114] See e.g., *Buckner* v. *Goodyear Tire & Rubber Company*, 339 F. Supp. 1108, 1124-5 (N.D. Ala. 1972), *aff'd per curiam* 476 F.2d 1287 (5th Cir. 1973); *National Organization of Woman* v. *Bank of California*, 6 EPD ¶8867 (N.D. Cal. 1973), p. 5675.

[115] See e.g., *Meadows* v. *Ford Motor Company*, *supra*, 9 EPD at pp. 6771-72.

[116] Back pay only includes "actual" losses in pay, 474 F.2d at 142, A. 524. For a thorough discussion of the methods available to the district court, in its discretion, for the calculation of back pay, see *Pettway* v. *American Cast Iron Pipe Company*, *supra*, 494 F.2d at 259-64.

[117] See e.g., *Johnson* v. *Goodyear Tire & Rubber Company*, *supra*, 491 F.2d at 1382.

sion whether to award back pay is committed to the discretion of the trial judge", 415 U.S. at 197. This is fully consistent with the decision below since the district courts still maintain discretion under the *Moody* standard, *see* pp. 55-56, *supra*. In fact *Curtis*, by referring to prior decisions[118] which specifically direct the federal courts to exercise their discretion to fashion relief designed to implement Congressional policy, lends direct assistance to the argument in support of the *Moody* standard.

Finally, Albermarle and the Union criticize the Fourth Circuit's standard for determining whether a back pay award is appropriate on a practical ground: that the standard will provide an obstacle to conciliation and settlement.[119] This argument is contrary to common sense and experience. If no standard guides the district court, then the lack of predictability in the law would be an inducement to litigate. Parties would be unable to predict whether the district court would award back pay; as a practical matter, the decision as to back pay liability could well turn on which district court judge finally determined the question.

The experience in Title VII litigation since 1973, when the Courts of Appeals established clear standards for the exercise of discretion, indicates that the voluntary resolution of employment discrimination suits has been advanced. Governmental agencies and private litigants have concluded many consent decrees in Title VII actions which have provided wide-ranging relief, including back pay.[120]

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[118] *Mitchell* v. *Robert De Mario Jewelry, Inc.*, *supra*; *Porter* v. *Warner Holding Co.*, *supra*; these decisions are discussed on pp. 52-53, *supra*.

[119] Co. Br. at 60-61; U. Br. at 32-33.

[120] See e.g., *United States* v. *Philadelphia Electric Company*, C.A. No. 72-1483 (E.D. Pa. Sept. 21, 1973) (Consent Decree); *United States* v. *Eastex, Inc.*, C.A. No. B-73-CA-81 (E.D. Tex. Feb. 18,

Rather than obstructing the elimination of employment discrimination, a clear judicial standard governing the award of back pay will serve the national purpose of ending employment discrimination by causing employers and unions to carefully evaluate, and to change, where discriminatory, their employment practices without first being subjected to administrative or judicial proceedings.[121]

> They [back pay awards] provide the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, as far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.

United States v. *N.L. Industries, Inc., supra,* 479 F.2d at 379.[122]

1974) (Consent Decree); *United States* v. *East Texas Motor Freight System,* C.A. No. 3-6025-B (N.D. Tex., Feb. 19, 1974) (Consent Decree); *EEOC* v. *Bank of America, Inc.,* C.A. No. C-71409CB-R (N.D. Cal. June 24, 1974) (Consent Decree); *EEOC* v. *Continental Trailways,* C.A. No. SA72-CA197 (W.D. Texas, March 19, 1973) (Consent Decree); *EEOC* v. *Preston Trucking Co.,* C.A. No. 72-632-M (D. Md. June 25, 1973) (Consent Decree); *EEOC* v. *Container Corporation of America,* C.A. No. 72-336-Civ.-J-T (M.D. Fla. Nov. 4, 1974) (Consent Decree).

Mack v. *General Electric Co.,* C.A. No. 69-2653 (E.D. Pa. 1973) (Consent Decree); *Patterson* v. *N.M.D.U.,* C.A. No. 73-Civ.-3058 (S.D.N.Y. October 25, 1974) (Consent Decree); *Branch* v. *Reynolds Metals,* C.A. No. 170-72-R (E.D. Va. 1974) (Consent Decree); *Burks* v. *Babcock & Wilcox Company,* C.A. No. 71-C-59L (E.D. Va. 1974) (Consent Decree); *Suggs* v. *Container Corporation of America,* C.A. No. 7058-72-P (S.D. Ala. April 1, 1974) (Consent Decree).

[121] We note, in this connection, the district court's speculation (A. 498)—seized upon by Albemarle—that defendants might have sought an earlier adjudication and termination of their unlawful practices, had they known that back pay liability was accruing.

[122] See also *Sprogis* v. *United Air Lines, supra,* 444 F.2d at 1201; *Culpepper* v. *Reynolds Metals Co.,* 421 F.2d 888, 891 (5th

This Court has emphasized that back pay awards under the National Labor Relations Act are designed to give effect to the public policy of the Act as well as to compensate those who suffered from unlawful employment practices. *NLRB* v. *Rutter-Rex Manufacturing Co., supra*, 396 U.S. at 263; *Nathanson* v. *NLRB, supra*, 344 U.S. at 27. Since Title VII of course effectuates a national policy as strong as that of the National Labor Relations Act, back pay is appropriate not only to compensate individuals but also to ensure compliance with statutory prohibitions.

In conclusion, the standard developed in *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400 (1968), to direct the exercise of discretion of district courts in awarding attorneys' fees under Title II of the Civil Rights Act of 1964, 42 U.S.C. §2000a-3(b), states a proper standard[123] to guide the exercise of discretion of district courts in awarding back pay under Title VII. The rationale is similar in both instances. The availability of back pay, like that of attorneys' fees, will further compliance with the law. The provision of attorneys' fees encourages members of the bar to represent aggrieved persons; back pay encourages employers and unions to scrutinize their practices, and encourages victims of discrimination to seek redress. Both remedies shift the financial burden of correcting discrimination from victim to violator.

The standard announced below directs district courts to exercise their discretion in furtherance of the purpose and

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Cir. 1970); see *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1163 (1971).

[123] "It follows that one who succeeds in obtaining an injunction under that title should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." 390 U.S. at 402.

policy of Title VII, but does not improperly restrict district courts from exercising their discretion.

C. Back Pay Is a Proper Remedy in This Case.

Defendants fully eliminated none of their discriminatory employment practices until entry of the district court's injunction in November, 1971, see pp. 8-12, *supra*. As a result of those practices, black employees suffered severe losses of income, see n. 17, *supra*. Yet the district court, after concluding that it had plenary discretion under §706(g), left the burden of these losses on the black workers. The court gave three reasons for its ruling: (1) the absence of bad faith non-compliance with Title VII by defendants, including certain steps taken by Albemarle to alleviate the severity of its discriminatory practices; (2) factors indicating that Albemarle might be less a culpable or more beneficent employer than others in its locality; and (3) the alleged lateness of plaintiffs' specification of the back pay claim and the possibility that defendants might have been prejudiced thereby (A. 498). The Court of Appeals rejected these reasons as legally inadequate to justify denying back pay (A. 520-522).[124]

Both precedent and policy support the award of back pay in this case. This Court's reminder in *Griggs* v. *Duke Power Co.*, *supra*, 401 U.S. at 432, that

> good intent or absence of discriminatory intent does not redeem employment procedures or testing mecha-

[124] Although the Court, because of its holding, had no occasion to review the finding of "good faith," the record casts substantial doubt on whether any such finding could be sustained. See pp. 3-12, *supra*. Moreover, the district court's finding was based in part on its erroneous view that Albemarle's testing program was job-related.

> nisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability

applies to remedies as well as to finding liability. For this reason the appellate courts have uniformly and correctly rejected "good faith"—or the absence of "bad faith"—as a defense for Title VII violators.[125] Good faith cannot relieve a discriminatory employer of liability under Title VII because Congress provided back pay as a remedy for economic injury, not for bad motives:

> . . . it is argued that back pay should not be awarded in the absence of specific intent to discriminate. A corollary argument is that the award was improper in light of the unsettled state of the law. The principal answer to both points is that back pay is not a penalty imposed as a sanction for moral turpitude; it is compensation for the tangible economic loss resulting from an unlawful employment practice. Under Title VII the plaintiff class is entitled to compensation for that loss, however benevolent the motives for its imposition. *Robinson* v. *Lorillard Corp., supra,* 444 F. 2d at 804.

Kober v. *Westinghouse Electric Corp.,* 480 F.2d 240 (3rd Cir. 1973), on which both defendants rely, is merely one in a line of cases involving state female protective statutes. See pp. 54-55, *supra.* Its reasoning is squarely based on the

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[125] Fourth Circuit: *Robinson* v. *Lorillard Corp., supra,* 444 F.2d at 802, 804; Fifth Circuit: *Johnson* v. *Goodyear Tire & Rubber Co., supra,* 491 F.2d at 1376-1377; *Pettway* v. *American Cast Iron Pipe Co., supra,* 494 F.2d at 253; *Baxter* v. *Savannah Sugar Refining Corp., supra,* 495 F.2d at 442-3; Sixth Circuit: *Head* v. *Timken Roller Bearing Co., supra,* 486 F.2d at 877; Seventh Circuit: *Waters* v. *Wisconsin Steel Works of International Harvester Co., supra,* 502 F.2d at 1321; Eighth Circuit: *United States* v. *N. L. Industries, Inc., supra,* 479 F.2d at 379. The holding of these cases is in accord with settled principles in labor law and related fields. See cases cited in *Johnson* v. *Goodyear Tire & Rubber Co., supra,* 491 F.2d at 1377 n.37.

"special circumstances" presented in such cases, see 480 F.2d at 246-8; it does not endorse the good faith defense in any broader context.[126]

"Good faith" or absence of "bad faith" are unworkable standards for back pay awards. Such standards would inevitably involve the courts in adjudication of subjective states of mind of employers and labor unions. Meaningful standards of definitive proof as to good or bad faith would be difficult if not impossible to articulate and apply. In practice, acceptance of such a test would assure the district courts an effectively unreviewable discretion to implement—or to ignore—the statutory purpose.

The factors cited by the district court (A. 498) illustrate the anomalous results that the "good faith" standard invites. The court found some support in the fact that paper mill jobs on the whole may require a higher skill level than tobacco industry jobs; yet this circumstance cannot excuse the imposition of non-job-related criteria like Albemarle's educational requirement and testing program, and is totally irrelevant to the unlawful job-seniority system. The court further noted that Albemarle paid

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[126] See, *e.g.*, *Manning* v. *International Union*, 466 F.2d 812 (6th Cir. 1972), distinguished in *Head* v. *Timken Roller Bearing Co.*, *supra*, 486 F.2d at 877 n.10; *LeBlanc* v. *Southern Bell Telephone & Telegraph Co.*, *supra*, distingished in *Johnson* v. *Goodyear Tire & Rubber Co.*, *supra*, 491 F.2d at 1377 ("Such an argument [as Albemarle's] falls of its own weight").

Norman v. *Missouri-Pacific Railroad Co.*, *supra*, does not support the good faith defense for which Albemarle cites it (Br. at 56). The Eighth Circuit in *Norman* expressed grave doubts as to the viability of that defense, see 497 F.2d at 596-7. Nor will Albemarle's citation *(id.)* of *United States* v. *N. L. Industries*, *supra*, and *United States* v. *St. Louis-San Francisco Railway Co.*, 464 F.2d 301 (8th Cir. *en banc* 1972), *cert. denied* 409 U.S. 1107 (1973), withstand scrutiny. Neither case as interpreted in *Norman*, *supra*, relied primarily on good faith or absence of bad faith as its reason for denying back pay.

higher wages than other local employers;[127] but this cannot justify the fact that white paper mill workers earned substantially more than black paper mill workers because of race. Although Albemarle purportedly began trying to recruit black mechanics in 1964, it had made virtually no progress by mid-1967, two years after Title VII and one year after filing of this suit (see pp. 8-9, *supra*). And while the court applauded defendants' "voluntary" 1968 changes in the seniority system and LOP configuration, those changes left many unnecessary obstacles to black advancement and had little practical effect (see pp. 9-11, *supra*).

The district court also found an exculpatory circumstance in plaintiffs' failure to claim back pay from the outset of this case (A. 498). Its conclusion was apparently based on a theory of waiver or laches. Albemarle now seeks to bar black workers from back pay because, at an early stage of the litigation, a brief filed on their behalf had stated that back pay would be sought only for individuals before the court. Yet later, when it had become clear that class-wide back pay was being upheld by the courts, plaintiffs asserted such a claim—well over a year before the start of the trial. See p. 13, *supra*. The presence of the class back pay issue in the case was thereafter repeatedly stated and reaffirmed in a series of pre-trial orders of the district court.[128] Moreover, plaintiffs were ordered to answer supplementary interrogatories concerning the basis for and amount of back pay claimed on behalf of each class member (A. 46) and did so answer (A. 116-7); and individual members of the class

[127] The Company's evidence focussed on municipal civil servants, farm labor, hospital workers, and school teachers, Co. Ex. 11, 12, 15, 17. See Co. Br. 13.

[128] See Order of September 28, 1970 (A. 38), Order of May 28, 1971 (A. 46), and Order of July 8, 1971 (A. 51).

were obliged by court order to file proofs of claim (A. 55-56, 70-85).

Rule 54(c), F. R. Civ. P., directs that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." This directive, the plaintiffs' demand for judgment of back pay over one year before trial, and its own pre-trial orders contemplating back pay relief notwithstanding, the district court denied all back pay—with respect to both the named plaintiffs and the other class members—stating that

> the defendants would be substantially prejudiced by the granting of such affirmative relief. The defendants *might* have chosen to exercise unusual zeal in having this court determine their rights at an earlier date had they known that back pay would be at issue (A. 498) (emphasis supplied).

This was *not* a finding of fact on the part of the district court (*cf.* Co. Br. at 59 n.61) but merely part of one of its conclusions of law. By its own terms it was based on sheer conjecture and is unsupported by the record.[129] "Unusual zeal" for an early determination of their rights has never characterized the tactics of the defendants in any stage of this litigation—before or after they had learned of the back pay claim.

As shown above, back pay is a major remedy provided by Congress to effectuate the purposes of Title VII as well as to give financial relief to the victims of discrimination. Such important public rights ought not lightly to be deemed to have been waived. This Court has repeatedly held that

[129] It appears to have been an afterthought, since in any event it could have had no relevance to the back pay claims of the named plaintiffs which the court also denied.

a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy.[130] Rule 54(c) reflects the movement of the law away from formality and ritual and towards the rendition of justice. It has been, and should be, construed to prevent parties from forfeiting their claims because of a harmless misstep early in the litigation. See 10 Wright & Miller, *Federal Practice and Procedure* §§2662, 2664 (1973), especially pp. 117-8 and cases there cited; 6 Moore's *Federal Practice* (2d ed. 1974) ¶54.62. The attachment of draconian consequences to the wording of the 1966 memorandum submitted by the class representative was especially inequitable in light of the court's obligation to protect the interests of class members.[131] To treat plaintiffs' 1966 statement as a waiver would only serve to undermine the strong Congressional policy against discriminatory employment practices, cf. *Alexander* v. *Gardner-Denver Co., supra*, 415 U.S. at 51-52.

Albemarle asserts that "the long delay in adding the back pay claims satisfies all of the elements of laches. . . ." (Co. Br. at 58). This is transparently incorrect. Laches may not be invoked merely upon a showing of delay; the delay must amount to improper lack of diligence with resulting prejudice to the opposing party. See *Costello* v. *United States*, 365 U.S. 265, 282 (1961); *Gardner* v. *Panama Railroad Co.*, 342 U.S. 29, 30-31 (1951):

---

[130] See *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 704 (1944); *Schulte* v. *Gangi*, 328 U.S. 108 (1946):

> Where a private right is granted in the public interest to effectuate legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate. 324 U.S. at 704-705.

[131] *Cf.* Rule 23(e), F.R.Civ.P.; *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 175-177 (1974).

> The equities of the parties must be considered as well. Where there has been no inexcusable delay in seeking a remedy and where no prejudice to the defendant has ensued from the mere passage of time, there should be no bar to relief. (citations omitted)

No such "inexcusable delay" and no such prejudice is shown here.

The question of the treatment of belated claims for back pay has arisen in at least three circuits. They have uniformly held that because of the importance of back pay, such claims must be entertained. See *Rosen* v. *Public Service Electric & Gas Co., supra,* 409 F.2d at 780, n.20; *Robinson* v. *Lorillard Corp., supra,* 444 F.2d at 802-03; *United States* v. *Hayes International Corp.,* 456 F.2d 112, 116, 121 (5th Cir. 1972); see also *Sprogis* v. *United Air Lines, Inc., supra,* 444 F.2d at 1202. These cases apply *a fortiori* to the instant case. In each of them, the claim for back pay was asserted after the conclusion of trial—not, as here, over a year before the trial was started. See also *NLRB* v. *Rutter-Rex Manufacturing Co.,* 396 U.S. 258 (1959).[132] In every one of these cases, the defendants could have interposed the same conjecture raised by defendants here that the late back pay claim was somehow prejudicial to them. The short answer as held in *Robinson, supra,* is

> In our case, because the obligation to provide back pay stems from the same source as the obligation to reform the seniority system, any general defenses relevant to the back pay award were equally relevant to

[132] In *Rutter-Rex*, this Court reversed the Court of Appeals' modification of the NLRB's back pay calculation which was based on the "inordinate" delay (five years) of the Board in determining back pay, and ordered the Board's back pay award reinstated in full.

> the suit for injunctive relief. Any specific defenses related only to computation of back pay may be raised during the process of assessing individual back pay claims, possibly before a special master. The defendants have in no way been prejudiced by the belated claim. 444 F.2d at 803.[133]

In his dissenting opinion, Judge Boreman suggested two additional grounds for supporting the denial of back pay by the district court. These were: the sale of assets of the original employer company by one parent corporation to another, and the possibility that the delay might have impeded defendants' pre-trial preparation (474 F.2d at 146 n.16; A. 531 n.16). These reasons were mere speculation since there was no indication in the district court's opinion that it had found either factor significant. Neither ground is persuasive. The rights of victims of employment discrimination should not be sacrificed in the crossfire of intercorporate controversies.[134] Nor will the record support the conjecture as to the difficulty of preparing defenses to individual back pay claims. In any event, the order of the Court of Appeals would necessitate a new and separate hearing on individual back pay claims. Defendants will have the opportunity—and the burden—to mount

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[133] Indeed in *Rental Development Corp. of America* v. *Lavery*, 304 F.2d 839, 842 (9th Cir. 1962), the very case relied upon by Albemarle to demonstrate that Rule 54(c) would not be applied if "the failure to ask for particular relief substantially prejudiced the opposing party" (Co. Br. at 59), the holding of the case was that the issues were similar and that there was no prejudice.

[134] The sale of corporate assets of the original Albemarle Company from Ethyl Corp. to Hoerner-Waldorf Corp. raises merely the question of which of the various companies involved in the "corporate re-shuffle" (A. 35) should bear which part of the burden—not whether the losses are recoverable. Indeed, Ethyl Corp. filed a cross-claim (later voluntarily withdrawn) against Hoerner-Waldorf Corp. (A. 41) demanding that the latter defend the action for it and hold it harmless.

their defenses to the back pay claims of particular class members at that stage.[135]

In terms of the Fourth Circuit's standard, there are no special circumstances in this case which would render an award of back pay unjust.[136] And under any standard this Court could articulate consistent with the Congressional history and purpose, the record will not support denial of compensation to the plaintiff class.

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[135] A separate proceeding to compute back pay claims following the trial of the issue of liability is routinely ordered in Title VII cases. See, *e.g.*, *Robinson* v. *Lorillard Corp.*, *supra*, 444 F.2d at 803 n.17; *Baxter* v. *Savannah Sugar Refining Corp.*, *supra*, 495 F.2d at 443-4; *Pettway* v. *American Cast Iron Pipe Co.*, *supra*, 494 F.2d at 258-60.

[136] Both defendants seek affirmance of the district court's exercise of discretion on the additional "special circumstances" ground that the district court probably had other unstated reasons for its ruling (Co. Br. at 59-60; U. Br. at 29 n.32). This hypothesis serves to highlight the need for an appellate standard and the appropriateness of the Fourth Circuit's formulation. To allow district courts, in the name of "discretion" or as a "special circumstance," to deny back pay relief on the basis of unarticulated reasons or retrospective rationalizations would ill serve the Congressional purpose that such relief should be available as appropriate.

CONCLUSION

The judgment of the Court of Appeals for the Fourth Circuit should be affirmed, and the case remanded to the district court for proceedings consistent with the opinion of the Court of Appeals.

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APPENDIX

APPENDIX

Glossary of Technical Terms Relevant to the Testing Issue

The following terms occur frequently in the discussion of the testing issue, with specific reference to the purported job-relatedness of Albemarle's tests, and in the guidelines and authorities cited in that discussion. These terms are defined or described according to leading texts in the psychological testing field, as indicated.

1. *Validity.*

"Undoubtedly the most important question to be asked about any test concerns its validity, i.e., the degree to which the test actually measures what it purports to measure." A. Anastasi, *Psychological Testing*, London: MacMillan (3rd ed. 1968), p. 28.

"The validity of a test concerns *what* the test measures and *how well* it does so. *Id.*, p. 99.

"Validity refers to the degree to which a test correlates with a relevant measure of criterion of job performance. Unless those people who score relatively high on a test are also likely to perform better on the job, a test lacks validity for that purpose and is useless for selecting personnel for the job in question." J. Kirkpatrick et al., *Testing and Fair Employment*, New York: New York University Press (1968), p. 6.

2. *Validation.*

"[T]he point of research is to determine whether an appreciable relationship exists between scores on the predictor variable and some subsequent measure of job performance. . . .

Appendix

"Validation asks two fundamental questions. The first asks whether a relationship exists at all. If so, the second question is whether the relationship is strong enough to be useful." R. M. Guion, *Personnel Testing,* New York: McGraw-Hill (1965), p. 131.

3. *Criterion.*

"An index of occupational success used in connection with the validation of tests is termed the criterion." E. E. Ghiselli, *The Validity of Occupational Aptitude Tests,* New York: John Wiley (1966), p. 22.

"Prediction is based on a correspondence between one variable, the predictor, and another variable, the job behavior. That which is to be predicted is called the criterion." Guion, *supra,* p. 90.

"It is important that the criterion possess a high degree of validity. A test that can predict quality of work will seem to be a poor test if it is judged by a criterion that does not fairly indicate quality of work. The criterion (or set of criteria) should cover all important aspects of the job." L. J. Cronbach, *Essentials of Psychological Testing,* New York: Harper & Row (1970), p. 413.

4. *Criterion-related validation.*

"Criterion-related validity indicates the effectiveness of a test in predicting an individual's behavior in specified situations. For this purpose, performance on the test is checked against a *criterion,* i.e., a direct and independent measure of that which the test is designed to predict." Anastasi, *supra,* p. 105.

"Criterion-related validity can be best characterized as the practical validity of a test in a specified situation." *Id.* at 111.

5. *Concurrent validation* (*cf.* predictive validation).

"The term prediction can be used in the broader sense, to refer to prediction from the test to any criterion situation, or in the more limited sense of prediction over a time interval. It is in the latter sense that it is used in the expression predictive validity. The information provided by predictive validity is most relevant to tests used in the selection and classification of personnel. . . .

"In a number of instances, concurrent validity is found merely as a substitute for predictive validity. It is frequently impracticable to extend validation procedures over the time required for predictive validity or to obtain a suitable preselection sample for testing purposes. As a compromise solution, therefore, tests are administered to a group on whom criterion data are already available. Thus, the test scores . . . of employees [may be] compared with their current job success.

"For certain uses of psychological tests . . . concurrent validity is the most appropriate type and can be justified in its own right. The logical distinction between predictive and concurrent validity is based, not on time, but on the objectives of testing. Concurrent validity is relevant to tests employed for diagnosis of existing status, rather than prediction of future outcomes." Anastasi, *supra,* p. 105.

6. *Correlation and Correlation Coefficient.*

"Meaning of correlation. Essentially, a correlation coefficient (r) expresses the degree of correspondence, or *relationship,* between two sets of scores." Anastasi, *supra,* p. 72.

"A correlation coefficient is a statistical summary of the relation between two variables. It is the most common

way of reporting the answer to such questions as . . . : Does this test predict performance on the job?" Cronbach, *supra*, p. 128.

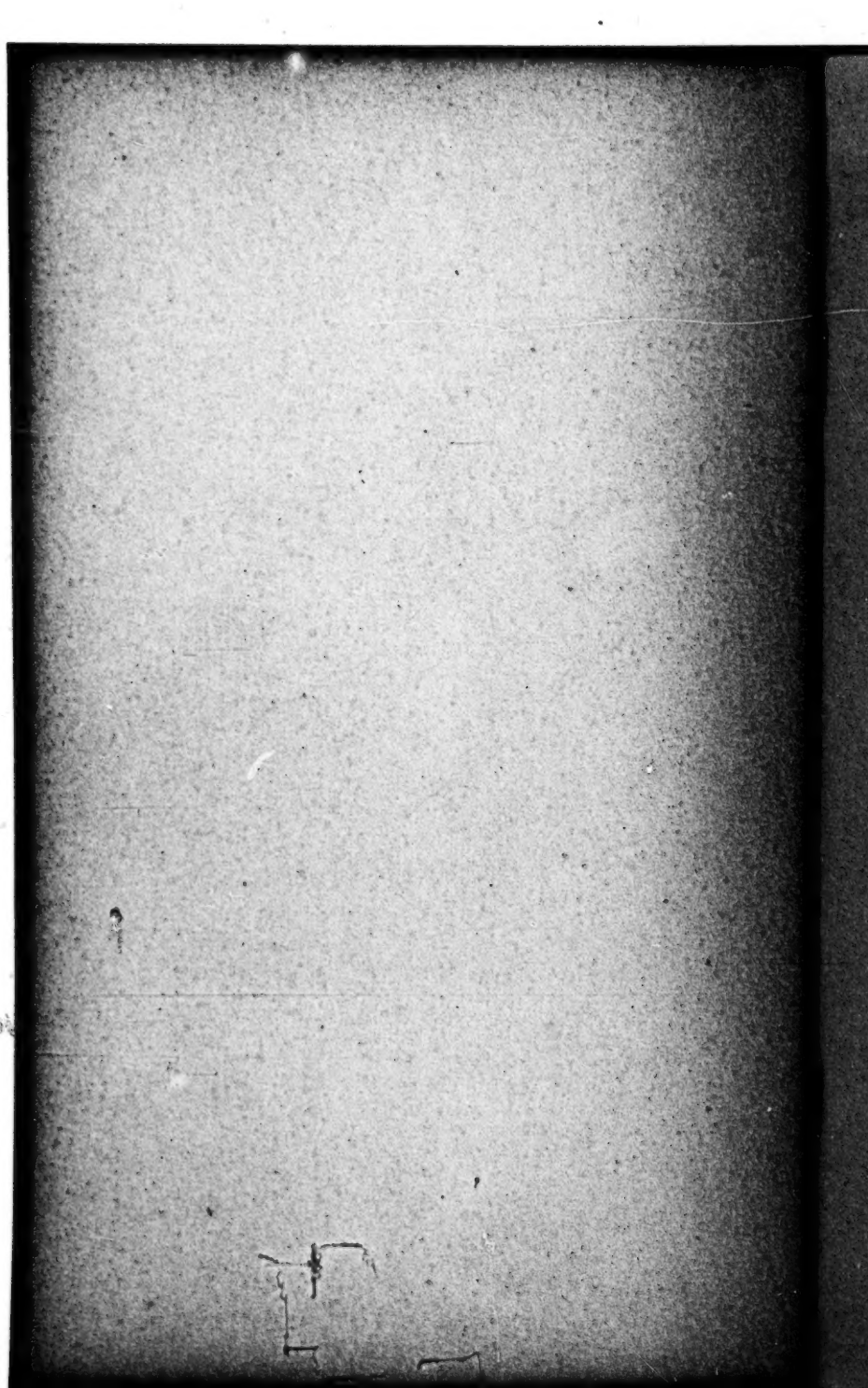
7. *Statistical significance.*

"When we say that a correlation is 'significant at the 1 percent (.01) level,' we mean the chances are no greater than one out of a hundred that the population correlation is zero. . . . Significance levels refer to the risk of error we are willing to take in drawing conclusions from our data. . . . Most phychological research applies at either the .01 or the .05 levels, although other significance levels may be employed for special reasons.

". . . Any correlation below that value [.05] simply leaves unanswered the question of whether the two variables are correlated in the population from which the sample was drawn." Anastasi, *supra*, p. 76.

8. *Job analysis.*

"Job analysis sets up hypotheses stating which abilities and habits contribute to success on the job. No machine-like procedure of checking off one by one all possible job elements has ever been found successful. Instead, the psychologist studies the task with whatever insight and psychological knowledge he can muster. Job analysis is an art." Cronbach, *supra*, p. 407.



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REPLY BRIEF OF EMPLOYER, PETITIONERS

In The

Supreme Court of the United States

October Term, 1974

No. 74-389

Albemarle Paper Company, et al., *Petitioners*,

v.

Joseph P. Moody, et al., *Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI FILED OCTOBER 7, 1974
CERTIORARI GRANTED DECEMBER 16, 1974

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-389

ALBEMARLE PAPER COMPANY, ET AL., *Petitioners,*

v.

JOSEPH P. MOODY, ET AL., *Respondents.*

REPLY BRIEF OF EMPLOYER PETITIONERS

STATEMENT OF THE CASE

Much of Respondents' Statement of the Case is devoted to issues not before This Court, such as whether there had been past discrimination, as that term is now known, against blacks, and whether the seniority system tended to perpetuate that discrimination. These were matters not contested before the District Court and Albemarle, at least, thought that the District Court had disposed of them finally. Furthermore, the record in this case clearly shows Albemarle's subscription to the idea of equal employment opportunity and its affirmative efforts beginning prior to the effective date of Title VII to achieve it.

Because the total employment at Albemarle's Roanoke Rapids mill has contracted with advancing technology, to freeze the changing employment picture at a particular moment is misleading. Thus the 1967 statistics set forth in the opinion of the District Judge (A. 481-486) and heavily relied upon by Respondents (Brief for Respondents at 8-9) understate the results of Albemarle's good faith affirmative efforts to comply with Title VII's mandate. Despite the contracting work force, the employment status and opportunities for blacks had improved measurably by the time of the 1971 trial.[1]

The Roanoke Rapids mill has provided relatively high paying employment for scores of persons, both black and white, with minimal qualifications. To say that Albemarle has been discriminatorily denying employment opportunities to persons who have "long been qualified" (see Amicus Brief of Lawyers Committee for Civil Rights Under Law at 7) is simply not true. The fact is, of the sixteen class members whose testimony is part of the record herein, not one indicated any qualification for advancement, and in several cases not even any desire therefor.

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[1] See R. 1168-1172; Company Ex. No. 4; and compare the District Court's Conclusion of Law, A. 496:

> "Although overt racial discrimination ceased subsequent to the effective date of Title VII, the effects of this racial discrimination have not been eradicated."

with Brief for Respondents at 8.

And compare A. 489:

> "In 1964 prior to the effective date of the Civil Rights Act of 1964, the company began actively recruiting black applicants from the local high schools to apply for the Maintenance Apprenticeship Program. . . . There were five blacks in the program by September of 1967 and as of 1970, ten blacks had entered the program."

with Brief for Respondents at 9.

ARGUMENT

I. Testing

A. This Case Is Distinguishable From Griggs v. Duke Power Company On Its Facts.

Respondents contend that this case is controlled by principles enunciated by This Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) due to a factual similarity between the cases. In truth, the only factual similarity is that both Duke and Albemarle used as parts of their employment selection programs the Wonderlic Test. Aside from this one fact the cases are entirely different. Duke Power Company simply relied on the fact that its tests were "professionally developed" in accordance with the language of the statute. In the instant case, Albemarle implemented its selection processes gradually as the need for better qualified employees arose between the early 1950's and 1963, long before the Act had even been contemplated.[2] The bona fide business need behind these requirements is clear in the record. A. 331-332, 346-349. And, Albemarle has demonstrated here that its testing requirements helped achieve the genuine business need to select employees who could satisfactorily perform increasingly complex jobs. (A. 345).[3] If,

[2] The Beta was adopted after a validation study demonstrated that it correlated positively with successful job performance. Respondents attack this study as inadequate (Brief for Respondents at 24, n. 31). Regardless of the value of this study as proof of job relatedness, the fact that such a study was done indicates that the test was not implemented as an unnecessary obstacle to employment.

[3] In *Griggs*, this Court stated:

> "In the context of this case, it is unnecessary to reach the question whether testing requirements that take into account capability for the next succeeding position or related future promotion might be utilized upon a showing that such long-range requirements fulfill a genuine business need." 401 U.S. at 432

as this Court stated in *Griggs*, "The touchstone is business necessity," 401 U.S. at 431, then surely Albemarle has met its burden of showing a genuine business need for its selection criteria.

B. Plaintiffs Did Not Sustain Their Burden Of Proving Adverse Effect, Particularly As To The Revised Beta Examination.

Respondents' argument on the issue of the effect of Albemarle's testing requirements on blacks amounts to an effort to substitute testimonial generalities and findings of fact in other forums for factual proof of adverse effect. Respondents' burden under *Griggs* was to prove that the Revised Beta and the Wonderlic, as utilized by Albemarle at its Roanoke Rapids mill were, in the words of the statute, "designed, intended or used to discriminate." 42 U.S.C. §2000e-2(h). Albemarle submits that the record remains devoid of such proof.[4]

Furthermore, the Court of Appeals' injunction was based on a misapprehension. As Albemarle has noted (Albemarle Brief at 44), and as Respondents admit in their brief (Brief

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In the present case, it is clear that Albemarle cannot hire qualified people from the local labor market to fill the highly skilled jobs at the top of its lines of progression. Unless Albemarle can train its own personnel through its functionally related lines (See the District Court's finding of fact number 8 at A. 477), it would eventually be unable to maintain productivity. The business need for Albemarle to require applicants for the lowest level jobs in its skilled lines of progression to possess the qualifications ultimately to reach the highest level jobs is therefore abundantly clear on the record.

[4] The record is particularly lacking in proof as to the impact of the Beta Examination. (See Albemarle Brief at 28-31.) Although questioned extensively, the best Respondents' expert, Dr. Katzell, could say with respect to a disparate effect of the Beta was: "While I don't know of such data specifically on the Beta for sure, I think there is this, but my memory is not clear on this at the moment." (A. 406). Respondents' other expert, Dr. Barrett, was never asked.

for Respondents at 26), the tests have long since been eliminated from many lines of progression. Thus, the actual use of tests which the District Court declined to enjoin was much narrower than the supposed use of tests which the Court of Appeals would enjoin.

C. The Alleged Deficiencies In Albemarle's Test Validation Study Are Based On Guidelines Which Are Irrelevant Under The Circumstances Of The Case And Which Are Not Entitled To Deference.

Respondents argue that Dr. Joseph Tiffin's failure to conduct job analyses led to job performance ratings possibly based on irrelevant factors so that Dr. Tiffin's data and conclusion are unreliable. While Albemarle has touched upon this argument in its initial brief on the merits (See pp. 36-43), the point warrants some further consideration here.

Respondents' argument is based on a premise that there existed "confusion prevalent among the supervisors who rated job performance for validation purposes." (Brief for Respondents at 32). There is absolutely no record support for that premise. Moreover, even if the premise were true, the effect would be the opposite of that suggested by Respondents.

According to authority quoted by Respondents, unreliable job performance ratings tend to *decrease* the likelihood of obtaining significant positive correlations between test scores and the criterion:

> "A test that can predict quality of work will seem to be a poor test if it is judged by a criterion that does not fairly indicate the quality of work. The criterion (or set of criteria) should cover all important aspects of the job." Cronbach, *Essentials of Psychological Testing,* 413 (1970). (Quoted in Brief for Respondents at A2.)

Manifestly the criterion at issue here—rankings in order of overall job performance (A. 175)—covers all important aspects of the jobs. Assuming that there exists reason to believe that the tests measure aptitudes important to successful job performance—and the District Court found a logical nexus between the abilities measured by the tests and the safe and efficient operation of the mill (A. 493-494)—positive correlations between the test scores and unreliable criteria could occur only by chance. Yet Dr. Tiffin's conclusion was based only on correlations which were statistically significant at the level, or higher, suggested by the EEOC. 29 CFR § 1607.5 (c)(1) (1970). (A. 314). Thus, the probability that the correlations Dr. Tiffin relied on could have occurred solely by chance is at most one in twenty.[5] Therefore, Respondents' apparent conclusion that lack of job analyses caused unreliable job ratings which in turn rendered Dr. Tiffin's statistics "unimpressive" (Brief for Respondents at 32-33) has no basis in law, logic or fact.

In any event, the Guidelines relied upon by the Court of Appeals majority and by Respondents[6] in their brief simply have no application to the purpose for which Dr. Tiffin's study was done and under the circumstances surrounding the study. Dr. Tiffin conducted essentially a revalidation study, his criterion was overall job performance, he had extensive experience in the paper industry, and, as Albemarle demonstrated in its initial Brief filed in This Court, racial bias

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[5] It is worthy of note that the correlations obtained in Tiffin's study, when averaged by use of a formula known as Fisher's Z Transformation, yield the following average correlations across all jobs studied: Beta, .314; Wonderlic A, .644; Wonderlic B, .586. For a sample size of 121 employees (the total studied by Tiffin) a correlation as high as .235 could occur solely by chance only in one in 100 times.

[6] The Respondents also rely on standards published by the American Psychological Association which have no application in this case. (See Albemarle Brief n. 35).

among supervisors could not possibly have affected his results. (Albemarle Brief at 42-43).

This Court's general approval of the EEOC Guidelines in *Griggs*, limited to approval of the concept of job relatedness, 401 U.S. at 433-34, cannot be read as having approved all of the many specific technical suggestions contained in the 1970 Guidelines.[7] Albemarle submits that the Court of Appeals' deference to the 1970 Guidelines elevated them to substantive regulations with which an employer must comply in order to sustain its burden of proof. As so construed, the Guidelines are not "suitable procedural regulations to carry out the provisions of this title," 42 U.S.C. §2000e-12(a), and therefore exceed the EEOC's statutory grant of power. It is submitted, therefore, that the Court of Appeals erred in deferring to the Guidelines as controlling in this case.

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[7] The Guidelines were promulgated without the notice and hearing required by Section 4 of the Administrative Procedure Act, 5 U.S.C. §553, because, as the EEOC asserted, they were merely interpretative. The Guidelines therefore lack the force of law, and the degree of deference to be accorded them depends on "the thoroughness evident in [their] consideration, the validity of [their] reasoning, [their] consistency with earlier and later pronouncements, and all those factors which give [them] power to persuade, if lacking power to control." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). See also *American President Lines, Ltd.* v. *Federal Maritime Commission*, 316 F.2d 419, 421 (D.C. Cir. 1963; Burger, J.). Those factors militate here against deference. The deference decreed by the Fourth Circuit, and urged by Respondents here and the EEOC below is more appropriate to so-called "legislative rules" (see 1 DAVIS, ADMINISTRATIVE LAW §§5.03, 5.04 (1958)); these Guidelines cannot be elevated to that status without observance of the procedures mandated by 5 U.S.C. §553.

D. Conclusion.

If tests are useful, as everyone including this Court (*Griggs, supra,* at 436) seems to agree, this is a clear case where the tests should be upheld.

II. Back Pay

A. Introduction

Respondents concede, as they must, that Congress left the fashioning of appropriate relief in Title VII actions to the equitable discretion of the District Court. (Brief for Respondenets at 55-56). Respondents further concede that the "special circumstances" rule applied by the Court of Appeals panel majority to justify reversing Judge Dupree's discretionary denial of back pay severely restricts the exercise of that discretion. (Brief for Respondents at 53-54). Respondents argue, however, that the "special circumstances" rule is a necessary constraint on the discretion of district courts to grant or deny back pay in Title VII actions. Albemarle disagrees.

B. Respondents' Distrust Of Equitable Discretion Is Unwarranted.

Respondents argue that the "special circumstances" rule is necessary "to eliminate fundamentally inconsistent applications of Title VII." (Brief for Respondents at 53). This argument assumes that appellate courts are unable to provide effective review of discretionary remedial orders, a totally unwarranted assumption. For example, This Court for many years has left the fashioning of effective antitrust relief to the discretion of the district courts while exercising meaningful appellate review.[8]

[8] Compare, *United States* v. *Glaxo Group, Ltd.*, 410 U.S. 52, 64 (1973), and *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 89 (1950), with *Maryland & Va. Milk Prod. Ass'n.* v. *United States*, 362 U.S. 458, 473 (1960).

Further, Respondents argue that good faith is an unworkable standard for back pay awards and "would assure the district courts an effectively unreviewable discretion." (Brief for Respondents at 62). What Respondents distrust and challenge is the essential characteristic of a court of equity—"a practical flexibility in shaping its remedies and . . . a facility for adjusting and reconciling public and private needs." *Brown* v. *Board of Education,* 349 U.S. 294, 300 (1955). Respondents' distrust of equitable discretion brings to mind This Court's comment in *Kerotest Mfg. Co.* v. *C-O Two Fire Equip. Co.,* 342 U.S. 180, 185 (1952):

> "Such apprehension . . . reflects an attitude against which we were warned by Mr. Justice Holmes, speaking for the whole Court, likewise in regard to a question of procedure: 'Universal distrust creates universal incompetence.' *Graham* v. *United States,* 231 U.S. 474, 480."

Albemarle agrees with Respondents' general statement, "the district courts have the discretion, and this is the heart of equitable discretion, to formulate relief that will both effectively remedy violations of Title VII and apply fairly to the pertinent employment system." (Brief for Respondents at 55). The issue here is whether that discretion should be shackled by a rule presumptively favoring a particular type of equitable relief—back pay. Of course, as Respondents note, a number of Title VII decrees have employed compensatory relief. But other Title VII courts, equally committed to the purposes of the Act, have found, for example, that broader injunctive relief is more equitable and appropriate than class-wide back pay.[9] To deprive the district courts of

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[9] See *United States* v. *United States Steel Corp.,* 371 F. Supp. 1045, 1063 (N.D. Ala. 1973). The Government has also seen fit in some "pattern or practice" suits not to seek back pay. See, e.g., *United States* v. *Bethlehem Steel Corp.,* 446 F.2d 652, 659 (2d Cir. 1971); Note, 84 HARV. L. REV. 1109, 1243 (1971). In that connection the

this remedial discretion would be fundamentally inconsistent with equity jurisdiction. As Mr. Justice Douglas said in dissent in *United Steelworkers* v. *United States*, 361 U.S. 39, 71 (1959):

> "One historic feature of equity is the molding of decrees to fit the requirements of particular cases . . . Equity decrees are not like the packaged goods this machine age produces. They are uniform only in that they seek to do equity in a given case."

Remedial flexibility is particularly important given the conflicting interests which must be balanced in Title VII litigation. Shortly after the Act became effective in 1965, it became apparent that the most complex and difficult problems of substantive law and remedies would involve the rights and status of the "incumbent Negro"—the black employee who was employed long before passage of Title VII under employment conditions that were often openly discriminatory.

Since the Act did not explicitly resolve the issue, it was left to the courts to decide whether Title VII proscribes racially neutral employment practices which are found to perpetuate discrimination occurring prior to passage of the Act.

The lower federal courts have now come to the view that Title VII does prohibit such racially neutral employment practices when they serve to retard the incumbent Negro's ability to assume his "rightful place" in his employer's and his union's operations. The resulting effort to change such racially neutral practices has focused upon some of the most

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author of the Note reported that a Justice Department official felt:

> "[J]udges may be more reluctant to find questionable, but long established practices a violation of the statute when large sums of back pay are involved." *Id.*

sensitive aspects of labor management relations—collectively bargained seniority systems, union hiring hall referral practices, and employer testing and promotion policies. This effort has frequently challenged, indeed jeopardized, private interests which have long been of paramount importance under federal labor laws—stability of a work force; the right of unions to participate through collective bargaining in the establishment of uniform rules to govern transfer, promotion, and the like; and the expectations of incumbent white employees who may suffer to the extent the incumbent Negro is benefitted.

In an area fraught with such conflicts, it is particularly important that courts of equity be left with full discretion to fashion the fairest and most effective relief in each particular case. As Chief Justice Burger said in *Lemon* v. *Kurtzman*, 411 U.S. 192, 200-201 (1973):

> "[I]n constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable . . . Mr. Justice Douglas, speaking for the Court, has said,
>
> > 'The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.' Hecht Co. v. Bowles, 321 U.S. 321, 329-330, (1944).
>
> "In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding that those interest have constitutional roots. [Footnote omitted]"

C. Back Pay Decisions Under Other Federal Labor Laws Are Not Dispositive.

Prior back pay cases under other federal labor laws do not support the back pay standard which Respondents would here impose. An employer who has violated the minimum wage or overtime provisions of the Fair Labor Standards Act, for example, has gained a financial advantage over competing employers who complied with the Act. Thus, a violator would be "enriched by the retention of money which it should have paid in wages" if back pay were not routinely awarded. *Shultz* v. *Mistletoe Express Serv., Inc.*, 434 F.2d 1267, 1272 (10th Cir. 1970). There is no such element of unjust enrichment in this case.

Under the National Labor Relations Act, the notion that back pay should be routinely awarded in cases under section 8(a)(3) has developed over the course of many years in the context of compensating an employee who was discharged, because the employee engaged in protected activities, by an employer motivated by a desire to discourage union membership.[10] The basis upon which such a back pay award may be computed is firmly established by the employee's prior performance of the job to which he is being reinstated.

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[10] Section 10(c) of the NLRA is significantly different from Section 706(g) of Title VII in that the word "shall" is used in the NLRA while the word "may" defines the scope of remedial authority under Title VII. (Albemarle Brief at 52, n. 52). Even under the mandatory language of the NLRA, this Court has recognized that "The remedy of back pay, it must be remembered, is entrusted to the [NLRB's] discretion; it is not mechanically compelled by the Act." *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 198 (1941). But, even accepting respondents' assertion that back pay is "routinely" awarded by the NLRB, there is a substantial difference in the equities of the parties, and in the complexities of computing a back pay award, between a Title VII "rightful place" action such as this and a discharge case under the NLRA.

On the other hand, in the type of Title VII action at issue here, the violation is based upon maintenance of a seniority system or other neutral employment practice which has perpetuated pre-1965 discrimination. Under the Respondents' formula back pay will be awarded regardless of motivation. The calculation of such back pay would be an inherently speculative and monumental task. The essential basis for relief is that the employee-plaintiffs have never attained the employment level to which they are entitled, and in many cases it is alleged that plaintiffs have been unlawfully discouraged from even seeking advancement. Because of "the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment," *Phelps Dodge Corp.* v. *N.L.R.B., supra,* 313 U.S. at 198, the district court in computing such back pay must take into account, separately with respect to each member of every class, subjective or complex factors such as (a) the theoretical job performance capability of the plaintiff, (b) the job categories which he could have fulfilled, (c) the availability of such jobs at relevant times in his career, (d) the causal relation between the unlawful practice and the plaintiff's employment history, and (e) the reason for any failure by plaintiff to seek available promotions. There would be nothing "routine" about such inquiries. They would vary significantly with the particular employment practice and the individual employees involved.

D. This Case Illustrates The Inherently Speculative Nature Of Back Pay Claims.

Prior to trial, District Judge Dupree entered an order requiring Respondents to introduce at the trial any evidence respecting back pay for members of the class. (A. 51). Respondents then expanded their witness list and filed a

motion to refer the computation of back pay for individual class members to a special master. (A. 68). This motion was not granted by the District Court. After the District Court ruled that it would hear the issue of damages at trial, Albemarle sought by every means it could conceive to ascertain what the individual claims for damages were. These were never disclosed and never proved, although a trial was held thereon.

At the trial, Respondents introduced only general statistical evidence that the mill's Negro employees had earned lower average wages than whites. (Plaintiffs' Exhibit No. 10). Respondents introduced no evidence concerning the job qualifications of particular class members, no analysis of vacancies and work force patterns that would assist the trier of fact in determining the "rightful place" of any class member, and indeed no evidence as to what jobs each class member would have been willing to assume. In short, Respondents introduced no credible back pay evidence and there was nothing in the record to justify specific back pay awards by the District Court.

Given Respondents' failure to come forward with specific back pay evidence, and the procedural history of this case, the District Court would surely have been justified in concluding that a back pay claim had not been proven. Cf. *Lea* v. *Cone Mills, Inc.*, 438 F.2d 86 (4th Cir. 1971). Respondents' suggestion (Brief for Respondents at 67) that this case should be remanded to the District Court for consideration of individual back pay claims and that Albemarle would there have the burden of disproving such claims, the bases of which are unknown to it, is but a veiled effort by Respondents both to correct their total failure to prove such claims at trial. Courts should not grant relief in the absence of proof. Speculation and statistical averages are not the tools of equity. As one court has already noted in a Title VII

case, the two concepts of failure of proof, and discretionary denial of monetary relief, effectively merge in this type of situation. *United States* v. *United States Steel Corp., supra.*, 371 F. Supp. at 1061.

E. Conclusion

Even before passage of Title VII, Albemarle had already undertaken affirmatively to recruit black employees for its skilled jobs, and from 1965 on made efforts to encourage black incumbents to progress within the company. In 1968, Albemarle abolished the distinction between its two Extra Boards. Also in 1968, in direct response to the developing case law,[11] and in order to achieve unquestioned compliance with the law, Albemarle and the Union negotiated a new collective bargaining agreement providing for plant seniority as the relevant measure for promotion, and for "red-circling" of pay rates. (A. 292-3; A. 233). After unsuccessfully attempting, as early as September 1969, to bring this matter for trial, and recognizing the uncertainties created by more recent Title VII decisions, Albemarle prior to trial indicated its willingness to accept whatever changes the court saw fit to make with regard to those seniority provisions.[12]

When Albemarle at the start of trial indicated its willingness to consent to modification of its seniority provisions by the District Court, the result was the entry of a decree which necessarily declared that the prior seniority provisions had,

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[11] *Quarles* v. *Philip Morris*, 279 F. Supp. 505 (E.D. Va. 1968); *United States* v. *Local 189, Papermakers (Crown Zellerbach)*, 282 F. Supp. 39 (E.D. La. 1968; preliminary injunction); on the merits, 301 F. Supp. 906 (E.D. La.), *aff'd.* 416 F.2d 980 (5th Cir. 1969), *cert. denied* 397 U.S. 919 (1970).

[12] It is of significance that the changes decreed by Judge Dupree were not major. Essentially, a transferred employee now retains his seniority even if he transfers back to his old line of progression.

to some extent, violated Title VII. From this technical finding of violation, entered so that the District Court could by consent order minor modifications of the seniority provisions, the Court of Appeals panel majority constructed a mandatory back pay rule entailing potentially massive financial consequences to employers regardless of their motivation. Adoption by this Court of such a mandatory and punitive back pay rule would insure vigorous defense by future Title VII defendants, of seniority or other racially neutral practices against the claim that they perpetuate past discrimination, and diminish the likelihood of entry of imaginative injunctive relief by consent and would greatly impede any settlement of Title VII actions. Neither the purpose nor the language of Title VII requires such a result.

CONCLUSION

For the reasons stated herein and for the reasons stated in Albemarle's Brief filed February 13, 1975 the decision of the United States Court of Appeals for the Fourth Circuit should be reversed and that of the United States District Court for the Eastern District of Norh Carolina should be affirmed.

Respectfully submitted,

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April 9, 1975

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-389

ALBEMARLE PAPER COMPANY, ET AL., PETITIONERS

v.

JOSEPH P. MOODY, ET AL.

No. 74-428

HALIFAX LOCAL NO. 425, UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, PETITIONER

v.

JOSEPH P. MOODY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

QUESTIONS PRESENTED

1. Whether a district court, in determining whether to award back pay to members of an identifiable class of persons who have suffered economic injury because of racially discriminatory employment practices in violation of Title VII of the Civil Rights Act of 1964, must exercise its discretion in a manner consistent with the remedial purposes of the Act.

2. Whether petitioner Albemarle's employment selection tests are unlawful because they have a disproportionate adverse impact on blacks and have not been shown to be substantially job-related.

INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Pursuant to Title VII of the Civil Rights Act of 1964 and Executive Order 11246, the Equal Employment Opportunity Commission, the Attorney General, and other branches of the federal government have responsibility for enforcement of federal laws providing for equal employment opportunities. Although this case was brought by private plaintiffs, the issues concerning back pay and testing raised here are similar to issues that arise in suits brought by the government. The resolution of the issues presented in this case will directly affect the government's enforcement responsibilities.

STATEMENT

1. On August 25, 1966, respondents, after they had received a right-to-sue letter from the Equal

Employment Opportunity Commission, filed a class action [1] against their employer, Albemarle Paper Company (petitioner in No. 74-389), and their union, Halifax Local No. 425 (petitioner in No. 74-428),[2] alleging that the defendants were engaged in racially discriminatory employment practices in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, *et seq.* The complaint sought a permanent injunction against those practices and prayed for "such other additional relief as may appear to the Court to be equitable and just" (A. 10).

The alleged discriminatory employment practices took place at Albemarle's paper mill in Roanoke Rapids, North Carolina. The principal business of the paper mill is the production of kraft paper, pulp,

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[1] The district court defined the classes represented by respondents as "(1) all Negroes employed at the Roanoke Rapids plant of Albemarle Paper Company as of June 30, 1967; (2) all Negroes employed at said plant after June 30, 1967, except those whose initial permanent positions were not job classifications limited to or predominantly staffed by Negroes; and (3) all Negroes who may hereafter apply for or be employed at said Roanoke Rapids plant who may be affected by the alleged racially discriminatory employment practices of the defendants" (A. 474).

[2] The original three defendants were Albemarle Paper Company (Virginia), the United Papermakers and Paperworkers, and Papermakers Halifax Local 425. The international union was subsequently dismissed as a defendant (A. 16-20). In 1968, the company's assets were sold and transferred in a series of transactions. As a result, Albemarle Paper Company (Delaware), Hoerner Waldorf Corporation, Ethyl Corporation, and First Alpaco Corporation were joined as defendants (A. 30-39).

and allied products (A. 88). The mill has 11 functionally discrete departments (A. 477, 514), and each department has one or more functionally related lines of progression consisting of several job categories (A. 88, 477). The mill has 17 lines of progression and more than 100 job classifications (A. 477, 514). In all but exceptional circumstances, employees enter a line of progression at the lowest paying job, and vacancies are filled by promotions from within each line of progression on the basis of seniority and ability (A. 477).

In addition to the lines of progression, the mill, prior to 1968, had two "extra boards"—reservoirs of employees who were available to staff the lowest-level jobs in the lines of progression. The General Extra Board supplemented the skilled lines of progression; the Utility Extra Board supplemented the unskilled lines of progression (A. 485). The extra boards were staffed by new employees and employees who had been laid off from other jobs and were awaiting recall (*ibid.*). In 1968, the two extra boards were merged (A. 486).

Promotions and demotions in the plant are governed by job seniority. When a vacancy occurs, the first opportunity to fill it is ordinarily given to the employee in the next lowest job category within the line of progression who has the greatest seniority in that job, if he possesses the necessary ability, experience, and training (A. 477-478).

Albemarle uses personnel tests in selecting applicants for employment in certain jobs. Since 1963,

applicants for 13 lines of progression in eight departments [3] have generally been required to have a high school education and to score successfully on the Revised Beta Examination—a nonverbal test developed during World War I to measure the intelligence of illiterate and non-English-speaking persons —and the Wonderlic A or B Series examinations—short, verbal tests used to measure general mental ability (A. 100-101, 487-488, 514).

2. After a trial, the district court found that "[p]rior to January 1, 1964, Albemarle's lines of progression were strictly segregated on the basis of race" (A. 480). Approximately 86 of the 100 jobs at the plant were "traditionally reserved for white persons" (A. 477). The court found that "[t]hose lines of progression to which black employees were traditionally assigned were lower paying than the 'white' lines of progression" and that "[t]he racial identifiability of jobs and departments in lines of progression were maintained subsequent to the effective date of Title VII (July 2, 1965)" (A. 480). The extra boards were also segregated on the basis of race. As of June 1967, there were 62 white and two

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[3] These figures were derived by the district court and the court of appeals from a stipulation filed on July 25, 1971 (A. 86-106). Altough the court of appeals stated that examinations are required for employment in 14 lines of progression (A. 514), both the stipulation and the district court's opinion indicate that 13 is the correct number. Albemarle states (Br. 13) that, as a result of changes in mill operations, the tests were administered, by the time of trial, to applicants for only eight lines of progression in four departments.

black employees assigned to the General Extra Board; no whites and 50 blacks were assigned to the Utility Extra Board (A. 484-485).

Although a 1968 collective bargaining agreement effected some "changes in the lines of progression [that] had the effect of eliminating, to some extent, their strictly segregated composition," "black employees were still 'locked' in the lower paying job classifications" (A. 485). Similarly, while the two extra boards were merged in 1968, "[e]mployees on the merged board still retain recall rights to jobs and lines of progression which they held prior to being reduced to the call board," so that "black employees are recalled to black jobs and white employees are recalled to white jobs" (A. 486).

The court concluded that "Albemarle practiced racially discriminatory employment practice[s] prior to July 2, 1965," and that "the effects of this discrimination has [*sic*] been perpetuated" (A. 495-496). The court stated (A. 496):

> Although overt racial discrimination ceased subsequent to the effective date of Title VII, the effects of this racial discrimination have not been eradicated. The job seniority system has resulted in blacks occupying the lower paying positions within an integrated line of progression. Other lines of progression remain essentially segregated because of the inability of black employees to meet the educational and testing requirements to transfer into other, higher paying lines of progression.

The court ordered the defendants "to abolish the existing seniority system based substantially on job seniority" and "to implement and permanently continue a system of plant seniority * * * so that * * * when employees of the affected class are competing with employees not of the affected class, and the qualifications of the competitors are relatively equal, plant seniority rather than job seniority shall govern" (A. 499-500).

The district court declined to award back pay to members of the class who had suffered economic injury as a result of the discriminatory employment practices that locked them into the lower paying jobs to which they had been assigned on the basis of race. The court rested its denial of back pay on two considerations. First, "there was no evidence of bad faith non-compliance with the Act" (A. 498).[4] Second, the plaintiffs did not specifically seek back pay in their complaint[5] and did not assert a back pay claim until "nearly five years after the institution of this action" (*ibid.*). "[T]he defendants

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[4] The court stated that Albemarle had begun in 1964 to recruit blacks for its Maintenance Apprentice Program, that it merged some lines of progression on its own initiative and took certain steps to correct abuses in accordance with developing judicial interpretations of the Act, and that it paid higher wages for all levels of employment than did other industries in the area (A. 498).

[5] In their memorandum in opposition to a motion for summary judgment, plaintiffs stated that "[n]o money damages are sought for any member of the class not before the court" (A. 13-14).

would be substantially prejudiced by the granting of such affirmative relief," the court stated, because they "might have chosen to exercise unusual zeal in having this court determine their rights at an earlier date had they known that back pay would be at issue" (*ibid.*).

The court also rejected respondents' contention that Albemarle's testing requirements are unlawful because they have a disproportionate adverse impact on blacks and were not shown to be related to job performance. It concluded that "[t]he personnel tests administered at the plant have undergone validation studies and have been proven to be job related" (A. 497).

The validation study conducted by Albemarle covered 10 job groups in 8 of the 13 lines of progression for which the tests are required (A. 514). Albemarle's expert conducted no job analysis of the jobs covered by the study.* The sample of employees tested for the study were selected from the top and middle ranges of the lines of progression (A. 490). Their scores on each of the three tests use by Albemarle—Beta, Wonderlic A, and Wonderlic B—were compared with job performance ratings assigned to them by two supervisors, who rated them according to this standard: "Excluding a man's attitude, just how well the guy can do the job when he's feeling right" (A. 195, 514-515). The study found "[s]ig-

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* The expert spent only about a half day at the plant (A. 174). He had no written job descriptions (*ibid.*) and did not speak with any supervisors while he was at the mill (A. 175).

nificant correlations * * * for at least one of the three tests investigated for nine of the ten groups of jobs" (A. 431). The use of all three tests was found valid only for one of the 10 job groups, and the use of the Beta together with either Wonderlic A or Wonderlic B—the use made of the tests by Albemarle[7]—was found valid only for two of the 10 job groups (A. 432).

On the basis of that validation study, the district court found that "[t]he defendants have carried the burden of proof" in demonstrating the job-relatedness of the company's testing program (A. 497). The court found, however, that "the high school education requirement used in conjunction with the testing requirements is unlawful in that the personnel tests alone are adequate to measure the mental ability and reading skills required for the job classifications" (A. 497). It accordingly enjoined Albemarle from "requiring a high school education as a prerequisite for employment, promotion or transfer" (A. 502).

3. The court of appeals reversed with respect to the back pay and testing issues (A. 512-537).[8]

On the back pay issue, the court held that neither plaintiffs' delay in making a claim for back pay nor the lack of evidence of bad faith noncompliance with

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[7] All applicants are given the Beta examination and both series of the Wonderlic test. They are required to score satisfactorily both on the Beta and on either the Wonderlic A or the Wonderlic B (A. 220).

[8] Petitioners did not appeal any aspect of the district court's order.

the Act "is sufficient to justify the district court's refusal to award back pay" (A. 520). Relying on its rejection of similiar contentions in *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, the court of appeals reasoned that Albemarle was not substantially prejudiced by the plaintiffs' delay in seeking back pay and that a showing of bad faith is not required for an award of back pay, because the award is designed not to penalize the employer but to compensate the victims of the discrimination for their tangible economic loss.

The court rejected the contention that the denial of back pay should nevertheless be sustained as within the discretion of the district court. "Where a district court fails to exercise discretion with an eye to the purposes of the Act, it must be reversed" (A. 523). The court stated that, in view of "the compensatory nature of a back pay award and the strong congressional policy embodied in Title VII"—which favors making the victims of the unlawful discrimination economically whole so far as possible—"a plaintiff or a complaining class who is successful in obtaining an injunction under Title VII of the Act should ordinarily be awarded back pay unless special circumstances would render such an award unjust" (A. 523-524). It held that "there are no such special circumstances here" (A. 524).

With respect to testing, the court stated: "The effect of the district court's approval of Albemarle's testing procedure is to approve a validation study done without job analysis, to allow Albemarle to

require tests for 6 lines of progression where there has been no validation study at all, and to allow Albemarle to require a person to pass two tests for entrance into 7 lines of progression when only one of those tests was validated for that line of progression. We think this was error" (A. 515). The court concluded that the tests were not shown to have "a manifest relationship" to the jobs for which they are used by Albemarle (A. 516). Since "[t]he plaintiffs made a sufficient showing below that Albemarle's testing procedures have a racial impact" (A. 515), and since Albemarle failed to show that the tests are substantially job related, it followed under *Griggs* v. *Duke Power Co.*, 401 U.S. 424, that the testing procedure is unlawful.*

SUMMARY OF ARGUMENT

I

A. When a district court finds that an employer or a labor union has intentionally engaged in unlawful employment practices, it may enjoin those practices and may "order such affirmative action as may be appropriate, which may include * * * reinstatement or hiring of employees, with or without back pay" (42 U.S.C. (Supp. III) 2000e-5(g)). The court's discretion with respect to back pay awards must, however, be exercised in accordance with "the

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* Judge Boreman dissented on the testing issue (A. 524-532), and Judge Bryan dissented on the back pay issue (A. 532-537).

large objectives of the Act" (*Hecht Co.* v. *Bowles*, 321 U.S. 321, 331), for it is the duty of a court of equity "to provide complete relief in light of the statutory purposes" (*Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292).

The objectives of Title VII are to eliminate discriminatory employment practices and, so far as possible, to compensate the victims of employment discrimination for their economic loss caused by the discrimination. The district court's duty "to fashion the most complete relief possible" (see 118 Cong. Rec. 7168, 7565) upon a finding of employment discrimination ordinarily means that it must both enjoin the unlawful practices and award back pay to the injured victims. "Only thus can there be a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination" (*Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 194). Moreover, the reasonably certain prospect that back pay will be awarded provides an important economic incentive for employers and unions to comply voluntarily with the provisions of Title VII and thereby to bring a prompt end to employment discrimination.

It follows that the Act's policies of making the victims whole and deterring future discrimination require back pay to be awarded to the injured employees unless, for substantial reasons that are consistent with the Act's purposes, awarding back pay would be unjust to the employer or the union. That is the standard that the court of appeals applied here

and that this Court applied with respect to awards of counsel fees under Title II of the Act in *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402.

B. The district court's reasons for denying back pay in this case do not satisfy that standard. Since the remedial purpose of Title VII is to compensate the injured victims of employment discrimination and not to punish the employer, the absence of "bad faith non-compliance" (A. 498) does not justify denying back pay. A requirement that injured employees prove malice or deliberate recalcitrance would be an unwarranted obstacle to effective relief and would weaken the incentive for voluntary compliance by making back pay awards depend upon the application of an uncertain, subjective standard. This Court rejected a similar standard for the award of counsel fees in *Newman* v. *Piggie Park Enterprises, Inc.*, *supra*, and it should reject it here as well.

Nor was the plaintiffs' delay in asserting a back pay claim on behalf of the entire class of injured employees a proper basis for denying back pay. The defendants were aware of that claim at least one year prior to trial, and their defenses to the claim were identical to their defenses with respect to injunctive relief. There is no foundation for the district court's speculation that the defendants "might have chosen to exercise unusual zeal" (A. 498) in expediting a trial if they had known of the back pay claim earlier, nor is there any support for petitioners' assertion that discovery was made more difficult by plaintiffs' delay. In the absence of a showing of sub-

stantial prejudice, that delay did not affect the district court's duty to award complete relief.

C. Back pay relief is not limited to those members of the class who have filed individual charges with EEOC. The filing of a single charge alleging unlawful employment practices fully satisfies the purposes of Title VII's filing requirement by putting the employer on notice of the charge and invoking EEOC's conciliation functions. There is no reason to require the filing of numerous identical claims. Congress considered and rejected precisely such a requirement when it enacted the 1972 amendments to Title VII.

II

A. That Albemarle's tests operate disproportionately to exclude blacks was implicit in the district court's lengthy discussion concerning the job-relatedness of the tests and was the subject of an explicit finding by the court of appeals (A. 515). Albemarle argues that the plaintiffs failed to make an adequate showing that the tests have a racially disparate impact, but that issue was not presented in the petition for a writ of certiorari and is not properly before this Court. In any event, the record supports the court of appeals' finding.

B. The court of appeals correctly concluded that Albemarle did not carry its burden of showing that its present use of the tests "have a manifest relationship to the employment in question" (*Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432). In making

that determination, the court of appeals properly looked to the EEOC *Guidelines* as "a helpful summary of professional testing standards" (*Vulcan Society* v. *Civil Service Commission*, 490 F. 2d 387, 394, n. 8 (C.A. 2)) and made proper use of the *Guidelines* in assessing the adequacy of Albemarle's test validation study.

In a Title VII case within the scope of EEOC's enforcement jurisdiction, it is particularly appropriate for a court to rely upon the professional expertise reflected in the *Guidelines*. And where, as here, the pertinent sections of the *Guidelines* accurately summarize the professionally accepted standards for test validation and no showing is made that there are significant differences of opinion within the profession, an employer whose validation study departs from the *Guidelines* should bear the heavy burden of showing that the departure was justified and that the study was nevertheless adequate to prove that the tests are job-related.

Albemarle's study was not conducted in accordance with the *Guidelines*, and the company neither justified the departure nor demonstrated that the study was otherwise adequate. Albemarle's expert failed to conduct a job analysis to determine the skills and abilities required for successful performance of the jobs he studied; under generally recognized professional standards, a job analysis is an essential first step in a proper employment test validation study. Its absence in Albemarle's study made it nec-

essary to rely on a vague, subjective standard for supervisory ratings of employees and made it impossible to tell whether the abilities rated by the supervisors and measured by the tests are the ones that are necessary to perform the jobs at the mill.

The study also departed from professional standards because Albemarle's expert did not take precautions to ensure that the tests were administered under controlled and standardized conditions and that the raters were kept unaware of the employees' test scores. Moreover, the jobs studied were at the higher levels in the plant, although applicants for employment naturally begin work at the lower levels. Albemarle did not show that it was reasonable to validate the tests for the jobs studied rather than those that a new employee would perform.

Even if the study had been conducted properly, however, its results do not show that the tests are related to the jobs for which they are used. The study covered only eight of the 13 lines of progression for which tests are required, and it found correlations supporting Albemarle's present use of the tests for only two of the 10 job groups studied. Albemarle's claim that it is necessary to ensure that all applicants are qualified for each line of progression in the plant is not supported by the record.

ARGUMENT

I

THE COURT OF APPEALS CORRECTLY HELD THAT BACK PAY SHOULD BE AWARDED TO THE IDENTIFIABLE VICTIMS OF UNLAWFUL EMPLOYMENT DISCRIMINATION HERE TO COMPENSATE THEM FOR THEIR ECONOMIC INJURY CAUSED BY THE DISCRIMINATION

The district court found that petitioners engaged in unlawful discriminatory employment practices that confined the black employees at Albemarle's paper mill to the lower paying, less desirable jobs to which they had been assigned on the basis of their race (A. 480-486, 496). The court was therefore authorized under Section 706(g) of the Act, 42 U.S.C. (Supp. III) 2000e-5(g), to enjoin the unlawful practices and to "order such affirmative action as may be appropriate, which may include * * * reinstatement or hiring of employees, with or without back pay * * *." Although the victims of petitioners' racially discriminatory practices suffered tangible economic loss as a result of the discrimination, the district court refused to award them compensatory back pay because it found "no evidence of bad faith non-compliance with the Act" and because respondents' initial failure specifically to request back pay on behalf of the class they represent may have induced petitioners not to exercise "unusual zeal in having this court determine their rights at an earlier date" (A. 498).

The court of appeals held that the district court's denial of back pay for those reasons was not a proper

exercise of its discretion under the Act. That discretion, the court stated, must be exercised "with an eye to the purposes of the Act" (A. 523) and in a way that gives the fullest possible effect, consistent with fairness, to the congressional policy of making whole the victims of employment discrimination.

Petitioners contend (Albemarle Br. 50-61; Halifax Br. 21-33) that the court of appeals unduly restricted the scope of the district court's statutory discretion in determining whether to award back pay and that the district court's refusal to award back pay in this case should have been sustained under "traditional equitable principles" (Albemarle Br. 53). Albemarle also argues (Br. 61-66) that back pay may not, in any event, be awarded to individual members of the affected class of injured employees who have not themselves filed charges with the Equal Employment Opportunity Commission. In our view, petitioners are wrong on both counts.

A. The Congressional Policy Reflected In Title VII Requires That Victims Of Employment Discrimination Be Awarded Back Pay In Compensation For Their Economic Loss Unless Special Circumstances Would Make Such An Award Unjust To The Employer

The issue here is not whether the district courts have discretion to award or withhold back pay, for the Act clearly commits that decision to the sound discretion of the trial judge. Nor is the issue whether that discretion "is governed by traditional equitable principles" (Albemarle Br. 53); Congress in-

tended in Section 706(g) to invest the courts with full, traditional equity jurisdiction to fashion effective relief upon a finding of unlawful employment practices. Cf. *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398, 400; *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-292.

The issue, rather, is the extent to which the district courts' exercise of discretion under the Act is circumscribed by, and must be responsive to, the legislative objectives of Title VII. It is settled, of course, that traditional equity jurisdiction does not empower a court to take whatever action it wishes. Discretion must be exercised according to appropriate standards. In the enforcement of a statutory scheme, the courts must exercise their discretion "in light of the large objectives of the Act"; their discretionary remedial determinations must "reflect an acute awareness" of the congressional policy (*Hecht Co.* v. *Bowles*, 321 U.S. 321, 331). It is "the historic power of equity to provide complete relief in light of the statutory purposes" (*Mitchell* v. *Robert DeMario Jewelry, Inc.*, *supra*, 361 U.S. at 292).

Albemarle thus properly concedes that a district court's discretion under Section 706(g) of the Civil Rights Act of 1964 "must be exercised consistently with legislative objectives" (Br. 53). It seeks to avoid the thrust of that principle, however, by arguing that the legislative objective was "to leave resolution of complex remedial problems to the traditional, discretionary powers of the federal courts of equity" (Br. 54).

But that argument begs the question. It merely restates a proposition that no one disputes—that the district courts have discretion in determining whether to award back pay. As Chief Justice Marshall stated long ago, to say that the matter is within a court's discretion means that it is addressed not to the court's "inclination, but to its judgment; and its judgment is to be guided by sound legal principles" (*United States* v. *Burr*, 25 Fed. Cas. 30, 35). The proper inquiry is this: what are "the large objectives of the Act" (*Hecht Co.* v. *Bowles*, *supra*, 321 U.S. at 331) in accordance with which that discretion must be exercised?

The large objectives of Title VII are to eliminate discriminatory employment practices and, as far as possible, to restore the victims of employment discrimination to the situation they would have been in but for the discrimination. "The clear purpose of Title VII is to bring an end to the proscribed discriminatory practices and to make whole, in a pecuniary fashion, those who have suffered by it" (*Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711, 720 (C.A. 7)).

Albemarle's contention that "the Congressional emphasis was on the prospective elimination of discriminatory practices and not on reparations" (Br. 54) rests on its inference from the word "may" in the statutory phrase "may include * * * reinstatement or hiring of employees, with or without back pay" (Section 706(g)). But that inference is unjustified. The same word is used in connection with injunctive

relief: "the court *may* enjoin the respondent from engaging in such unlawful practice" (emphasis added). Every court of appeals that has considered the question has correctly concluded that the Act's purposes are both to eliminate employment discrimination and to compensate the victims.[10]

The "make whole" purpose of Title VII is confirmed by the legislative history of the Equal Employment Opportunity Act of 1972, 86 Stat. 103, which reenacted Section 706(g) with changes not relevant here. The Section-by-Section Analysis of the 1972 Act, presented to the House and the Senate at the time the Conference Report on the Act was submitted to each body (118 Cong. Rec. 7166-7169, 7563-7567), states with respect to Section 706(g) (*id.* at 7168, 7565; emphasis added):

> The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful dis-

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[10] See, *e.g.*, *Rosen* v. *Public Service Electric and Gas Co.*, 477 F. 2d 90, 96 (C.A. 3); *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 804 (C.A. 4); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F. 2d 211, 252 (C.A. 5); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F. 2d 1364, 1375 (C.A. 5); *United States* v. *Georgia Power Co.*, 474 F. 2d 906, 921 (C.A. 5); *Head* v. *Timken Roller Bearing Co.*, 486 F. 2d 870, 876 (C.A. 6); *Bowe* v. *Colgate-Palmolive Co.*, *supra*, 416 F. 2d at 720; *Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d 1194, 1202 (C.A. 7), certiorari denied, 404 U.S. 991.

> crimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also *requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.*

Injunctive relief serves the purpose of eliminating the discriminatory practices prospectively. An award of back pay serves the purpose of making the victims financially whole. In view of the Act's objectives, the district court's duty "to fashion the most complete relief possible" (*ibid.*) ordinarily means that it must both enjoin the unlawful practices and award back pay to those who have suffered financial injury as a consequence of the discrimination. As this Court said with respect to back pay awards under Section 10(c) of the National Labor Relations Act, which was the model for Section 706(g) of the Civil Rights Act of 1964, "compensation for the loss of wages" is "generally require[d]" to effectuate the policies of that Act, because "[o]nly thus can there be a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination" (*Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 194). See also *National Labor Relations Board* v. *J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263.

Moreover, compelling practical considerations support the view that back pay should normally be

awarded to redress proven injuries. The reasonably certain prospect that back pay will be awarded provides the only substantial economic incentive to encourage voluntary compliance with Title VII and therefore a swift end to unlawful employment discrimination. Back pay awards "provide the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history" (*United States* v. *N.L. Industries, Inc.*, 479 F. 2d 354, 379 (C.A. 8)).

An employer or union is less likely to make a serious attempt to eliminate discriminatory practices or practices that perpetuate the effects of past discrimination if it can reasonably anticipate a court order after lengthy litigation that merely requires it to do what it should have done in the first place. Indeed, with respect to changes in practices that would require the expenditure of money, the absence of back pay as a usual element of relief under Section 706 (g) could provide a financial incentive to an employer or union to maintain the unlawful *status quo* as long as possible.

It follows that, in the exercise of their discretion to effectuate the Act's purposes and to encourage prompt, voluntary compliance with its terms, the district courts should ordinarily award back pay to the identifiable victims of unlawful employment discrimination, unless there are substantial countervailing considerations that make such an award unnecessary

or inappropriate. In the court of appeals' words, the injured victims of the discrimination "should ordinarily be awarded back pay unless special circumstances would render such an award unjust" (A. 523-524).

That standard neither forecloses nor unduly restricts a district court's exercise of discretion. Courts of equity always have "the duty * * * to be alert to provide such remedies as are necessary to make effective the congressional purpose" (*J.I. Case Co.* v. *Borak*, 377 U.S. 426, 433). And in the enforcement of the civil rights statutes, "the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future" (*Louisiana* v. *United States*, 380 U.S. 145, 154).

The standard adopted by the court of appeals here is identical to the one that this Court applied to the exercise of a district court's discretion to award attorney's fees under Title II of the Act. *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400. The court of appeals there had ruled that counsel fees should be awarded only to the extent that a party advances defenses in bad faith and for purposes of delay. This Court held that that standard would not adequately effectuate the purposes of the counsel-fee provision of Title II. That provision was enacted "not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by

racial discrimination to seek judicial relief under Title II" (390 U.S. at 402). Since private litigation is an essential "means of securing broad compliance with [Title II]" (*id.* at 401), and since a plaintiff suing as a "private attorney general" cannot recover damages, awards of counsel fees are important to "vindicat[e] a policy that Congress considered of the highest priority" (*id.* at 402).

The situation here is analogous. While this case involves Title VII rather than Title II and back pay awards rather than attorney's fees, the effect of awarding back pay in the absence of special circumstances similarly vindicates the broad congressional policy reflected in the Act and similarly ensures compliance with the law. The "special circumstances" standard is no less an appropriate guide for the exercise of discretion in awarding back pay under Title VII than it is for the exercise of discretion in awarding counsel fees under Title II.

We do not suggest, nor did the court of appeals hold, that back pay is mechanically compelled where violations of the Act are found. Nor do we suggest that courts of appeals should lightly overturn the informed exercise of a district court's discretion. Where unlawful employment practices result in economic loss to identifiable persons, however, the "make whole" purpose of Title VII, and the important policy of encouraging voluntary compliance with the law, should normally call for compensation, in the absence of substantial countervailing considerations. The district court must articulate its reasons for denying

back pay, and those reasons should be carefully scrutinized by the appellate courts to ensure that the district court has fashioned the fullest possible relief consistent with fairness.

As we understand the application of the "special circumstances" standard to the question of back pay, the Act's policies of making the victims whole and deterring future discrimination require back pay to be awarded unless, for substantial reasons that are consistent with the purposes of the Act, awarding back pay would be unjust to the employer. One such special circumstance, in the context of employment practices that discriminate on the basis of sex, might be the employer's reasonable and good-faith reliance upon state female "protective" statutes. See *LeBlanc* v. *Southern Bell Telephone & Telegraph Co.*, 460 F. 2d 1228 (C.A. 5), certiorari denied, 409 U.S. 990; *Manning* v. *International Union*, 466 F. 2d 812 (C.A. 6), certiorari denied *sub nom. Manning* v. *General Motors Corp.*, 410 U.S. 946; *Kober* v. *Westinghouse Electric Corp.*, 480 F. 2d 240 (C.A. 3); but see *Schaeffer* v. *San Diego Yellow Cabs, Inc.*, 462 F. 2d 1002 (C.A. 9).[11] As we shall now show, no such special circumstance justified the district court's denial of back pay in the present case.

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[11] Under EEOC interpretive guidelines in effect from 1965 through August 1969, such state protective laws were considered consistent with Title VII. Compare 30 Fed. Reg. 14927 with 34 Fed. Reg. 13368. Reliance on a published EEOC guideline is a defense to liability under Title VII (42 U.S.C. 2000e-12(b)).

B. Neither The Absence Of Bad Faith Non-Compliance Nor The Tardiness Of Plaintiffs' Back Pay Claim Justifies Denying An Award Of Back Pay To The Injured Victims Of The Discriminatory Employment Practices In This Case

Since the purpose of a back pay award is to compensate the injured persons and not to punish the employer, the absence of bad faith should not ordinarily justify denying back pay. As between the innocent victim of an unlawful employment practice and the employer or union that has violated the law, the economic loss should normally fall on the wrongdoer. Cf. *National Labor Relations Board* v. *J. H. Rutter-Rex Mfg. Co., supra,* 396 U.S. at 264-265. Accordingly, the courts of appeals have uniformly rejected general claims of good faith as a reason to deny back pay under Title VII.[12]

To make back pay awards dependent upon proof of malice or deliberate recalcitrance would place an unwarranted obstacle in the path of those seeking compensation for economic injury resulting from un-

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[12] See, e.g., *Pettway* v. *American Cast Iron Pipe Co., supra,* 494 F. 2d at 253; *Head* v. *Timken Roller Bearing Co., supra,* 486 F. 2d at 877; *Sprogis* v. *United Airlines, Inc., supra,* 444 F. 2d at 1201; *Waters* v. *Wisconsin Steel Works,* 502 F. 2d 1309, 1321 (C.A. 7); *Baxter* v. *Savannah Sugar Refining Corp.,* 495 F. 2d 437, 442-443 (C.A. 5); *Robinson* v. *Lorillard Corp., supra,* 444 F. 2d at 804; *Rosen* v. *Public Service Electric and Gas Co., supra,* 477 F. 2d at 95-96; *Carey* v. *Greyhound Bus Co.,* 500 F. 2d 1372, 1378-1379 (C.A. 5); *Johnson* v. *Goodyear Tire & Rubber Co., supra,* 491 F. 2d at 1365-1367. Compare *United States* v. *St. Louis-San Francisco Ry. Co.,* 464 F. 2d 301, 311 (C.A. 8), with the same court's subsequent decision in *United States* v. *N.L. Industries, Inc., supra,* 479 F. 2d at 378-379.

lawful employment discrimination. As in *Newman* v. *Piggie Park Enterprises, Inc., supra*, where the Court rejected a similar "bad faith" test for the award of attorney's fees, requiring a showing of bad motive would not adequately effectuate the purpose of the Act.

The subjective good faith of an employer or a labor union does not diminish the economic harm suffered by the victims of discrimination and should not exempt the violator from the obligation to make those victims whole. Moreover, good faith is an inherently vague standard, the application of which would reduce the predictability of back pay awards and thus weaken the incentive for voluntary compliance with Title VII.

This Court stated in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432, that "good intent or absence of discriminatory intent does not redeem" an otherwise unlawful employment practice. For similar reasons, good intent should not, at least in the absence of extraordinary circumstances not present here, immunize an employer or a labor union from the obligation to compensate the innocent victims of employment discrimination.

Nor should the plaintiffs' initial disclaimer of an intention to seek back pay on behalf of members of the class not before the court justify denying an award in this case. Since petitioners knew of the back pay claim for all members of the class at least as early as June 4, 1970 (A. 28-29), they were on full notice of the claim more than a year prior to trial. The district court itself stated in an opinion filed 10

months prior to trial that "[t]he possibility of an award of money damages upon a determination of liability is still with us" despite the plaintiffs' earlier disclaimer (A. 38). The court reiterated several weeks before trial that the claim for back pay would be considered on its merits and that "damages may be recovered in this action if the plaintiffs prevail" (A. 51). This advance notice gave petitioners ample opportunity to address the matter completely in the district court.

Moreover, as the court of appeals correctly held, the defenses available to petitioners with respect to the back pay issue were identical to their defenses with respect to injunctive relief. Petitioners were thus no less able to defend against the back pay claim than they would have been had it been asserted at the time the complaint was filed. The district court's speculation that petitioners "might have chosen to exercise unusual zeal" in expediting the trial if they had known that back pay was in issue (A. 498) is contradicted by the absence of any indication that they exercised any such "unusual zeal" after learning that the plaintiffs were seeking back pay. Albemarle makes no representation in its brief that it would have sought an earlier trial.

Albemarle contends that "[d]iscovery relating to individual claims was clearly rendered much more difficult, if not impossible, by the passage of time" (Br. 58). But the record reflects that the district court ordered the plaintiffs to answer Albemarle's interrogatories concerning individual back pay claims

and to submit "a statement as to each such member of the class as to how he was personally and specifically discriminated against; and the amount of damages being claimed" (A. 46). Albemarle does not indicate why those discovery procedures were inadequate.[13]

In the absence of substantial prejudice to petitioners, the delay in claiming back pay should not alter the district court's duty "to fashion the most complete relief possible" (Section-by-Section Analysis of 1972 Act, *supra*, 118 Cong. Rec. 7168, 7565). Rule 54(c) of the Federal Rules of Civil Procedure provides that the district court "shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." Accordingly, other courts of appeals have correctly held that Title VII back pay claims asserted even after trial are entitled to full adjudication in the absence of prejudice. See *Rosen* v. *Public Service Electric and Gas Co.*, 409 F. 2d 775, 780, n. 20 (C.A. 3); *Robinson* v. *Lorillard Corp.*, *supra*, 444 F. 2d 802-803; *United States* v. *Hayes International Corp.*, 456 F. 2d 112, 121 (C.A. 5).

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[13] Nor should back pay be foreclosed because Albemarle's assets were sold by Ethyl Corporation to Hoerner Waldorf Corporation in 1968. If Hoerner Waldorf truly acted "in the belief that in this suit plaintiffs were not seeking damages" (Albemarle Br. 58), that consideration goes only to the allocation of liability as among the various defendants.

C. Back Pay Claims Should Be Determined For All Class Members Who Have Sustained Economic Loss, Whether Or Not They Filed Individual Charges With The Equal Employment Opportunity Commission

Albemarle concedes (Br. 62) that membership in a Title VII class action for injunctive relief need not be limited to persons who have filed charges with the Equal Employment Opportunity Commission. *Miller* v. *International Paper Co.*, 408 F. 2d 283, 284-285 (C.A. 5); *Oatis* v. *Crown Zellerbach Corp.*, 398 F. 2d 496, 499 (C.A. 5). It contends, however, that back pay should be denied to those members of the class who did not individually file charges with EEOC.

The purpose of the provision of Title VII (Section 706, 42 U.S.C. 2000e-5) requiring the filing of charges with EEOC is to provide notice to the charged party of the alleged violation of the Act and to bring to bear the voluntary conciliatory functions of EEOC. The filing of a single charge alleging unlawful employment practices gives the employer notice of the complaint and an opportunity to correct the unlawful practices. It would serve no useful purpose to require scores of substantially identical claims to be processed through EEOC when a single charge is sufficient to satisfy the requirements of Title VII. *Bowe* v. *Colgate-Palmolive Co.*, *supra*, 416 F. 2d at 720; *Miller* v. *International Paper Co.*, *supra*, 408 F. 2d at 285; see also *Franks* v. *Bowman Transportation Co.*, 495 F. 2d 398, 421-422 (C.A. 5), certiorari granted on other issues, March 24, 1975, No. 74-728; *Head* v. *Timken Roller Bearing Co.*, *supra*, 486 F. 2d at 876.

Just as with injunctive relief, once it has been determined that the defendant has engaged in unlawful employment practices that have caused the class members financial loss, the defendant's liability for back pay arises from conduct applicable to all affected members of the class. That the particular way in which that common conduct has affected individual class members may differ in degree, so that the amount of back pay owing to each affected class member may vary, does not change the essential class characteristics of the discriminatory practices. "Once class-wide discrimination has been demonstrated to result in disproportional earnings, a class-wide decision that back pay is appropriate can be discerned without deciding which members of the class are entitled to what amounts" (*Pettway* v. *American Cast Iron Pipe Co., supra,* 494 F. 2d at 257). Thereafter, the district court [14] can proceed to determine how much back pay is owed to which class members.[15]

As respondents' brief demonstrates (pp. 37-41), the legislative history of the Equal Employment Op-

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[14] In appropriate cases, the court may refer the matter to a special master. See Fed. R. Civ. P. 53. The district court in the present case stated in a pretrial order that "if [back pay] claims become too numerous or complicated, this phase of the case may be referred to a special master" (A. 51). The record reflects that approximately 80 persons filed claims for back pay in the district court (A. 70-85, 116-117).

[15] For a comprehensive discussion of methods for determining back pay awards, see *Pettway* v. *American Cast Iron Pipe Co., supra,* 494 F. 2d at 251-263, and *Johnson* v. *Goodyear Tire & Rubber Co., supra,* 491 F. 2d at 1374-1375, 1379-1380.

portunity Act of 1972 shows that Congress considered and rejected a provision, originally included in the bill that passed the House, that would have foreclosed an award of back pay to any member of a class who had not filed an individual charge with EEOC. The report accompanying the Senate bill, which omitted the provision contained in the House bill, stated that "any restriction on [class] actions would greatly undermine the effectiveness of title VII" (S. Rep. No. 415, 92d Cong., 1st Sess., p. 27). The Section-by-Section Analysis of the bill that emerged from the Conference Committee and that was passed by both houses stated: "[T]he leading cases in this area to date have recognized that many Title VII claims are necessarily class complaints and that, accordingly, it is not necessary that each individual entitled to relief be named in the original charge or in the claim for relief. A provision limiting class actions was contained in the House bill and specifically rejected by the Conference Committee" (118 Cong. Rec. 7168, 7565).

Congress thus explicitly rejected the precise limitation on class action relief that Albemarle now asks this Court to accept.

II

ALBEMARLE'S TESTING PROGRAM IS UNLAWFUL BECAUSE ITS TESTS OPERATE TO EXCLUDE BLACKS AND HAVE NOT BEEN SHOWN TO BEAR A DEMONSTRABLE RELATIONSHIP TO SUCCESSFUL PERFORMANCE OF THE JOBS FOR WHICH THEY ARE USED

In *Griggs* v. *Duke Power Co.*, 401 U.S. 424, this Court held that Title VII prohibits the use of tests or other employee selection procedures that operate to exclude members of minority groups, unless the employer demonstrates that the procedures are substantially related to job performance—*i.e.*, that they reliably measure capability for, or accurately predict successful performance of, the jobs for which they are used. The district court in the present case ruled that Albemarle carried its burden of demonstrating that its tests are job-related. The court of appeals, however, relying on the principles established by this Court's decision in *Griggs* and looking to EEOC's *Guidelines on Employee Selection Procedures* (29 C.F.R. Part 1607) for guidance in determining the adequacy of Albemarle's proof, held that the company's test validation study was methodologically deficient and did not, in any event, demonstrate that the tests provide a reasonable measure of the applicant's ability to perform successfully the jobs for which the tests are used. That holding is correct.

A. Albemarle's Tests Have A Disproportionate Adverse Impact On Blacks

Under Title VII, as construed by this Court in *Griggs*, the plaintiffs bear the threshold burden of showing that a challenged testing procedure disqualifies from employment opportunities a disproportionately high percentage of minority group candidates. If that showing is made, the burden shifts to the defendant to demonstrate that the tests are job-related.

Although the district court did not specifically state that Albemarle's tests disproportionately exclude blacks, it did find that the higher paying lines of progression "remain essentially segregated because of the inability of black employees to meet the educational and testing requirements" (A. 496). Moreover, the adverse racial impact of the tests was an implicit premise of the court's lengthy discussion concerning the job-relatedness of those tests, in which it concluded that "[t]he defendants have carried the burden of proof" by demonstrating that the tests are job-related (A. 497). The court of appeals was more explicit. It stated that "[t]he plaintiffs made a sufficient showing below that Albemarle's testing procedures have a racial impact" (A. 515).

Albemarle argues (Br. 28-31) that the plaintiffs' showing was not sufficient and that the company therefore was not required to prove that the tests are job-related. That issue, however, was neither presented in Albemarle's petition for a writ of certiorari nor fairly comprehended within any issue that was presented. It is, therefore, not properly before this

Court. *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16.

In any event, we believe, substantially for the reasons stated by respondents (Br. 19-21), that the court of appeals was justified in concluding that the plaintiffs carried their threshold burden of showing a disproportionate racial impact.

B. The Company's Testing Program Was Not Shown To Be Job-Related

Albemarle attempted to meet its burden of showing that its tests are related to the jobs for which they are used by submitting the results of a test validation study conducted in 1971 by Dr. Joseph Tiffin (A. 431-438). The court of appeals correctly concluded that the study failed to demonstrate that Albemarle's tests "have a manifest relationship to the employment in question" (*Griggs* v. *Duke Power Co.*, *supra*, 401 U.S. at 432).

In reaching that conclusion, the court of appeals drew upon the testing expertise reflected in several sections of EEOC's *Guidelines on Employee Selection Procedures*, 29 C.F.R. Part 1607. One of those sections emphasizes the importance of a careful job analysis to identify "[t]he work behaviors or other criteria of employee adequacy which the test is intended to predict" (29 C.F.R. 1607.5(b)(3)). Another highlights the danger of relying upon the "subjective evaluations" of supervisors in measuring the job performance of the subjects of a validation study, because of "the possibility of bias inherent in" such

evaluations (29 C.F.R. 1607.5(b)(4)). A third section states that the validity of a test with respect to a particular job may be demonstrated by evidence of validity with respect to a related job, if "no significant differences exist" between the jobs (29 C.F.R. 1607.4(c)(2)).

The court of appeals held that Albemarle's validation procedure was deficient because the expert who conducted the study performed no job analysis but relied exclusively upon the "possibly subjective rating of supervisors who were given a vague standard by which to judge job performance" (A. 517). Referring to the *Guidelines*, the court stated: "We agree that some form of job analysis resulting in specific and objective criteria for supervisory ratings is crucial to a proper concurrent validation study" (A. 518).

The court also held that, "[e]ven if the validation procedure had been proper, it was error to approve the testing procedures for lines of progression where there had been no validation study" (*ibid.*). The court recognized that "a test need not always be validated for each job for which it is required" (*ibid.*), but it held that the absence of any job analysis for the lines of progression involved in the study and those for which the tests are required "prevents concluding that no significant differences exist in the jobs in question" (A. 519).

Finally, the court held that "it was also error to approve requiring applicants to pass two tests for positions where only one test was validated" (*ibid.*).

Although Albemarle argued that the requirement is appropriate because the company hires employees into a pool from which they may move into any one of several lines of progression, the court stated that "Albemarle has not shown that hiring all employees into a pool is necessary to the safe and efficient operation of its business, nor has it shown that hiring employees for specific lines of progression is not an acceptable alternative" (A. 519-520).

In our view, each of these holdings is correct. Albemarle's validation study was not conducted in accordance with professionally accepted standards, and it failed, in any event, to show that the tests are substantially related to performance of the jobs for which they are used.

1. ***The court of appeals correctly looked to the EEOC Guidelines for guidance in assessing the adequacy of Albemarle's validation study***

Albemarle's threshold contention is that the court of appeals erroneously "equat[ed] EEOC suggested technical methodology with acceptable standards of judicial proof of job relatedness" (Br. 34). That is not the way we read the court of appeals' opinion.

The court did not state or imply that the *Guidelines* have the force of law or that the adequacy of a validation study depends upon rigid compliance with each provision of the *Guidelines*. It merely looked to the *Guidelines* as a source of professionally accepted standards for the validation of employee selection procedures, giving them the "deference" to which they

are entitled as an "interpretation of the Act * * * by the enforcing agency" (A. 516). See *Griggs* v. *Duke Power Co., supra*, 401 U.S. at 433-434.

The determination whether a testing device has been adequately validated as a reasonable measure of job performance is complex and technical. Since most district judges are not experts in industrial psychology or psychometrics and are not professionally equipped to evaluate the adequacy of a test validation study, it is appropriate for them to defer to the experts in those fields for guidance.

There are several accessible sources of such expertise in the field of employee test validation. The American Psychological Association's *Standards for Educational and Psychological Tests and Manuals* (hereinafter APA *Standards*) are generally regarded as stating in a comprehensive fashion the accepted standards of the psychological profession.[16] The government agencies with responsibilities in the area of equal employment opportunities—including EEOC, the Department of Labor, and the Civil Service Com-

[16] The 1966 edition of the APA *Standards* is part of the record in this case and is set forth at A. 415-426. The *Standards* were revised in 1974, but the revisions do not substantially affect the provisions relating to the matters at issue here. Albemarle's expert, Dr. Tiffin, testified that the *Standards* are "a classic" in the psychological profession, that he generally agrees with the principles for validating tests that are contained in the *Standards*, and that he attempted in his study to follow those principles "[a] hundred percent" (A. 172, 209).

mission—publish guidelines or regulations dealing in a more concise fashion with test validation.[17]

These standards, guidelines, and regulations are not in every respect identical, but each can provide useful guidance to a court in evaluating an employer's test validation study. In a case such as the present one, involving a private employer subject to the provisions of Title VII and within the scope of EEOC's enforcement responsibilities, it is particularly appropriate for the court to look to the EEOC *Guidelines* for "a helpful summary of professional testing standards" (*Vulcan Society* v. *Civil Service Commission*, 490 F. 2d 387, 394, n. 8 (C.A. 2)), since "these guidelines undeniably provide a valid framework for determining whether a validation study manifests that a particular test predicts reasonable job suitability" (*United States* v. *Georgia Power Co.*, 474 F. 2d 906, 913 (C.A. 5)).

If there are substantial, legitimate differences within the profession, the court should of course apply the *Guidelines* with appropriate caution in light of those differences. But where, as here, the *Guidelines* accurately reflect the standards and expertise of the psychological profession and no showing is made that

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[17] The former Labor Department order governing the validation of employment tests by contractors and subcontractors subject to the provisions of Executive Order 11246 appears at A. 321-328. The current version, which is substantially the same as the EEOC *Guidelines*, appears at 41 C.F.R. Part 60-3. The Civil Service Commission's regulations governing test validation appear at 37 Fed. Reg. 21557-21559.

there are significant differences of professional opinion with respect to the relevant portions of the *Guidelines*, an employer whose validation study departs from those provisions should bear the heavy burden of showing that the departure was warranted and that the validation study was nevertheless adequate to demonstrate that the tests are job-related. In these circumstances, the *Guidelines* "should be followed absent a showing that some cogent reason exists for noncompliance" (*United States* v. *Georgia Power Co.*, *supra*, 474 F. 2d at 913).

The court of appeals in the present case did not rigidly and uncritically apply the *Guidelines* to Albemarle's study. It looked to the *Guidelines* for assistance in evaluating that study and found that the pertinent provisions were helpful in identifying the study's inadequacies. Albemarle made no claim that those provisions were the subject of professional disagreement, nor did it show that the study was adequate notwithstanding its apparent defects. In those circumstances, the court's limited reliance upon the *Guidelines* was plainly appropriate.

2. Albemarle's validation study was not conducted in accordance with professionally accepted standards

The tests used by Albemarle—the Revised Beta Examination and the Wonderlic A and B—do not purport to test the specific skills that are required to perform the jobs in question. They measure only general aptitude and intelligence. Consequently, Title

VII's command that "any tests used must measure the person for the job and not the person in the abstract" (*Griggs* v. *Duke Power Co.*, *supra*, 401 U.S. at 436) highlights the importance of a properly conducted validation study in this case as a means of ensuring that the general aptitude tests used by Albemarle do not reflect the common "inadequacy of broad and general testing devices" (*id.* at 433).[18]

Albemarle's study, however, was not conducted in accordance with professionally accepted validation procedures. A job analysis—the breaking down of a job into its basic elements—is, under generally recognized professional standards, an essential first step in a validation study (A. 205, 369-371). See the EEOC *Guidelines*, 29 C.F.R. 1607.4(c), 1607.5 (b)(3) (A. 310, 312-313); APA *Standards*, ¶ C4 (A. 419); Department of Labor Order, 41 C.F.R. 60-3.6 (a)(3); Civil Service Commission Regulations, ¶ S3-1(a)(3) (37 Fed. Reg. 21557). Albemarle's expert conducted no job analysis.

A job analysis identifies the skills needed to perform the duties and tasks of a particular job. It might reveal, for example, that manual dexterity and concentration are necessary for a particular job but

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[18] The Wonderlic tests used here and in *Griggs* (see 401 U.S. at 430, n. 6) have been the subject of numerous challenges under Title VII. See, *e.g.*, *Rogers* v. *International Paper Co.* 9 [CCH] EPD ¶ 9865 (C.A. 8); *Young* v. *Edgcomb Steel Co.*, 499 F. 2d 97, 98, 100 (C.A. 4); *Franks* v. *Bowman Transportation Co.*, *supra*, 495 F. 2d at 412; *Duhon* v. *Goodyear Tire & Rubber Co.*, 494 F. 2d 817, 818-819 (C.A. 5); *Johnson* v. *Goodyear Tire & Rubber Co.*, *supra*, 491 F. 2d at 1372.

that speed is not. A job analysis therefore provides a basis for an objective rating of an employee's ability to do a job. Since Dr. Tiffin conducted no job analysis, he was obliged to rely on subjective supervisory ratings—"just how well the guy can do the job when he's feeling right"—as the sole measure of job performance.

Not only do such subjective criteria provide "a ready mechanism for discrimination" (*Rowe* v. *General Motors Corp.*, 457 F. 2d 348, 359 (C.A. 5)), but also they leave the raters free to interpret the criterion according to their personal views. Thus, while manual dexterity and concentration may in fact be the skills necessary for the job, the supervisor operating under a subjective standard might be rating the employees on the basis of speed and demeanor. If the tests actually measured the ability to work quickly, but not the relevant criteria of manual dexterity and concentration, there might be a high correlation between test scores and supervisory ratings, but the tests would not in fact measure the ability to perform the job.

Thus, while Albemarle contends that a job analysis is "superfluous" (Br. 37) because its tests correlated in some respects with the supervisory ratings, the absence of a job analysis makes it impossible to determine whether the correlation is meaningful. The abilities rated by the supervisors and measured by Albemarle's tests may not be the ones that are necessary to perform the jobs at the mill.

The absence of a job analysis led to another defect. The study was conducted not for individual jobs but for groups of jobs adjacent to each other on a line of progression (A. 166, 174). For example, Dr. Tiffin's first job group included the jobs of caustic operator and lime kiln operator (A. 432). Since there was no job analysis for either job, however, there was no basis for determining whether the two jobs involve similar tasks requiring similar skills, and therefore no foundation for concluding that they could properly be validated as a group (see A. 205).

This defect was compounded by the rating method. Supervisors were instructed to rate the employees in each job group against one another—that is, to rank them in order (A. 187). Thus, a supervisor was required to determine whether a caustic operator was superior to a lime kiln operator, though there was no analysis indicating that the two jobs were substantially the same.

The study was deficient in other respects as well. The EEOC *Guidelines*, 29 C.F.R. 1607.5(b)(2) (A. 312), like the APA *Standards*, ¶ C4.5 (A. 421), deem it essential that tests be administered under controlled and standardized conditions and that proper safeguards be taken to assure that test scores do not contaminate the job performance ratings—*i.e.*, that raters are not made aware of the test scores of the employees they are rating. Dr. Tiffin, however, did not administer the tests himself and did not know who did administer them (A. 176). He did not take precautions to avoid contamination

and did not know whether the supervisors who rated the employees were or were not aware of the test scores (A. 177). Plaintiffs' expert testified that it was "extraordinarily bad practice" for the person conducting the validation study to leave security measures to those "who have an interest in the outcome" (A. 206).

Moreover, the job groups used in the validation study were selected from the middle and higher categories in the lines of progression studied (A. 167, 178), although successful applicants for employment would be performing entry-level work in the lower job categories for several years. Dr. Tiffin sought to justify the use of the upper-level categories on the ground that "those are the jobs to which these men will go if they stay in the progression line long enough" (A. 167).

But that standard—which would justify the testing of beginning factory workers by examinations that measure the ability to perform the job of senior foreman—does not comport with the standards of the profession. The EEOC *Guidelines*, 29 C.F.R. 1607.4 (c)(1) (A. 310), state that it is appropriate to evaluate employees for higher job levels only if "new employees will probably, within a reasonable period of time and in a great majority of cases, progress to a higher level * * *." The Civil Service Commission's regulations, ¶ S3-5, 37 Fed. Reg. 21558, are to the same effect. While the court of appeals declined to decide whether this defect was significant because it believed that there was "insufficient evi-

dence below as to the time in which it takes an employee to progress to higher level jobs" (A. 519, n. 4), we submit that the burden of presenting that evidence should be borne by the person seeking to prove the job-relatedness of the tests. In the absence of such evidence, it is not possible to determine whether the tests have been properly validated for the jobs for which they are required.

3. *The study does not, in any event, demonstrate that the tests are related to the jobs for which they are used*

Even if Dr. Tiffin had followed professionally accepted procedures in conducting the validation study, the results of the study would not validate the tests for the use to which they are put by Albemarle. The district court found (A. 487), on the basis of a stipulation (A. 100), that the Beta and Wonderlic tests are administered to applicants for 13 lines of progression in eight departments.[19] Dr. Tiffin's study, however, covered only eight lines of progression in five departments (A. 514).

Title VII requires that a testing program with a racially disparate impact be shown to bear a demonstrable relationship to successful performance of each job for which it is used. Although a single validation study covering selected jobs might suffice to prove

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[19] Albemarle now states (Br. 13, 44) that the tests are in fact administered to applicants for eight lines of progression in four departments. If so, that can be shown in the district court on remand. We address our comments to the facts currently of record.

the test's validity as used for additional jobs that are substantially similar (see 29 C.F.R. 1607.4(c)(2) (A. 310-311)), the absence of a job analysis here makes it impossible to determine whether the jobs excluded from the study are similar to those that were covered. The result, as the court of appeals correctly held (A. 518-519), is that the study does not support Albemarle's use of the tests in lines of progression not covered by the study.

Moreover, Albemarle administers all three of its tests to job applicants and requires satisfactory scores on both the Beta and either the Wonderlic A or the Wonderlic B (A. 220; see Albemarle Br. 44, n. 44). But Dr. Tiffin's study found that the Beta together with either Wonderlic A or Wonderlic B correlated with job performance in only two of the 10 job groups studied (A. 432). As the court of appeals correctly held, the study does not justify "requiring applicants to pass two tests for positions where only one test was validated" (A. 519).

Albemarle's answer is that it is reasonable to require all applicants to qualify under both tests because it "cannot predict in which line of progression an employee will be needed" (Br. 46). The practice of hiring all employees into a pool "has the advantage of flexibility in workforce" (Br. 47), and it would be "unreasonable to disrupt the entire hiring system" (Br. 46) in order to ensure that the tests are used exclusively for the specific jobs to which they are related.

But this Court held in *Griggs* that a test which operates to exclude blacks must be "shown to bear a demonstrable relationship to successful performance of the jobs for which it [is] used" (401 U.S. at 431). Qualifying all applicants for every line of progression may give Albemarle greater "flexibility." But "Congress has forbidden * * * giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance" (*id.* at 436). Business "flexibility" is not "business necessity" (*id.* at 431).

Although Albemarle asserts that its testing program is necessary "[t]o preserve the safe and efficient operation of its pulp mill" (Br. 46), the court of appeals correctly found that the record does not support that assertion. "Albemarle has not shown that hiring all employees into a pool is necessary to the safe and efficient operation of its business, nor has it shown that hiring employees for specific lines of progression is not an acceptable alternative" (A. 519-520).

Finally, Albemarle states that, while "[t]hese objections may be grounds for modifying the District Court's order, * * * they are not grounds for enjoining the use of tests completely, as the Court of Appeals has done" (Br. 44). But that is not what the court of appeals has done. It held only that Albemarle's present use of the tests is unlawful. Albemarle is not precluded from demonstrating on remand that some other use of its tests is justified under the *Griggs* standard.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-389

ALBEMARLE PAPER COMPANY, ET AL., *Petitioners,*

v.

JOSEPH P. MOODY, ET AL., *Respondents.*

PETITIONERS' MOTION FOR LEAVE TO FILE POST-HEARING BRIEF AND APPENDIX AND POST-HEARING BRIEF AND APPENDIX

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MOTION FOR LEAVE TO FILE POST-HEARING BRIEF AND APPENDIX

Petitioner, Albemarle Paper Company, respectfully moves the Court for leave to file the attached post-hearing brief and appendix. In support thereof, Petitioner states as follows:

(1) The purpose of the instant Motion and Brief is to respond only to an erroneous representation made for the first time by the United States and the Equal Employment Opportunity Commission as *amici curiae* in their Brief filed herein on Friday, April 11, 1975, after all other briefs herein nad been filed, that:

> " . . . the *Guidelines* accurately summarize the professionally accepted standards for test validation . . . "

(2) Petitioners did not receive a printed copy of the Government's *amici curiae* brief until Saturday afternoon before the Monday morning oral argument herein. Therefore, at the time of oral argument the contents of the Government's brief were not known to many whose interests in the outcome of

this case are substantial. Counsel for Petitioners responded to the Government's contention in oral argument, but subsequently as the contents of the Government's brief received wider attention the view has been impressed upon Petitioners that the significance of the representation warrants, even at this late hour, its refutation be further documented.

WHEREFORE, Petitioner, Albemarle Paper Company, respectfully moves the Court for leave to file the attached post-hearing brief and appendix.

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IN THE

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OCTOBER TERM, 1974

No. 74-389

ALBEMARLE PAPER COMPANY, ET AL., *Petitioners,*

v.

JOSEPH P. MOODY, ET AL., *Respondents.*

PETITIONERS' POST-HEARING BRIEF

In their brief *amici curae,* the United States and the Equal Employment Opportunity Commission represented to the Court:

> "In a Title VII case within the scope of EEOC's enforcement jurisdiction, it is particularly appropriate for a court to rely on the professional expertise reflected in the *Guidelines.* And where, as here the pertinent sections of the *Guidelines* accurately summarize the professionally accepted standards for test validation and no showing is made that there are significant differences of opinion within the profession, an employer whose validation study departs from the *Guidelines* should bear the heavy burden of showing that the departure was justified and that the study was nevertheless adequate . . ." (Brief at 15).

Petitioner, Albemarle Paper Company, submits that the documents reproduced in the Appendix hereto clearly demonstrate that the above cited EEOC *Guidelines* (29 C.F.R. §§ 1607.1 *et seq*) do not accurately reflect *the* professionally

accepted standards for test validation and that a significant number of professional psychologists disagree with the *Guidelines* in important respects and in particular as applicable in this case. See Appendix hereto at App. 12-13, 21-23.

Respectfully submitted,

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Washington
District of Columbia } **AFFIDAVIT**

My name is Charles Paul Sparks. I am a practicing industrial psychologist employed by Exxon Company, U.S.A. in Houston, Texas as Coordinator of Personnel Research. In that capacity I have responsibility for test and other selection research throughout the Company. I am also an Adjunct Professor of Psychology in the Graduate School of the University of Houston at Houston, Texas. I am a Certified Psychologist by the Texas State Board of Examiners of Psychologists. I am a Fellow of the Division of Industrial and Organizational Psychology of the American Psychological Association and have served as Chairman of the Membership and the Professional Affairs Committees of the Division. I was a member of the Advisory Committee* on Selection and Testing of the Office of Federal Contract Compliance in the U. S. Department of Labor from its inception in 1968 to its discontinuance in 1973. I was a member and serve currently as Chairman of a Project Advisory Committee* on Selection Techniques of the American Petroleum Institute. I am a member of a Technical Subcommittee* of psychologists in an Ad Hoc Industry Group concerned with development of Uniform Guidelines on Employee Selection by the Equal Employment Opportunity Coordinating Council.

I have been asked to comment on a statement which appears in the brief filed for the United States and the Equal Employment Opportunity Commission by the U. S. Department of Justice and the Equal Employment Opportunity Commission in *Albemarle Paper v. Moody*. On page 15 of the brief appears the following:

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* Committee members and their affiliation shown on Attachment A. Each of these members is a respected expert in his field.

> "In a Title VII case within the scope of EEOC's enforcement jurisdiction, it is particularly appropriate for a court to rely upon the professional expertise reflected in the Guidelines. And where, as here, the pertinent sections of the Guidelines accurately summarize the professionally accepted standards for test validation and no showing is made that there are significant differences of opinion within the profession, an employer whose validation study departs from the Guidelines should bear the heavy burden of showing that the departure was justified and that the study was nevertheless adequate to prove that the tests are job-related."

The specific portion I wish to comment on is that which reads, ". . . the Guidelines accurately summarize the professionally accepted standards for test validation and no showing is made that there are significant differences of opinion within the profession. . . . "

The Equal Employment Opportunity Commission issued the subject Guidelines on August 1, 1970 (35 F.R. 12333) including the following introductory material:

> These Guidelines on Employee Selection Procedures supersede and enlarge upon the Guidelines on Employment Testing Procedures, issued by the Equal Employment Opportunity Commission on August 24, 1966. Because the material herein is interpretive in nature, the provisions of the Administrative Procedures Act (5 U.S.C. 553) requiring notice of proposed rule making, opportunity for public participation, and delay in effective date are inapplicable. The Guidelines shall be applicable to charges and cases presently pending or hereafter filed with the Commission.

Thus, the profession was given no opportunity to express an opinion as to whether the Guidelines accurately summarized the professionally accepted standards for test validation. Despite this fact, critical comments by members of the profession have been brought to the attention of EEOC in a

number of ways. Four sets of comments, incorporated by reference in this affidavit, are summarized here. Thus I have prepared a comparative analysis* of positions taken on six key issues included in the Guidelines by:

1) Individuals such as myself;
2) Publications such as that of the American Petroleum Institute (A.P.I.) (American Petroleum Institute, *Equal Employment Opportunity: An Interpretive Guide* at 36-52 (1972));
3) Reports such as that submitted by psychologists of an Ad Hoc Industry Group (attached as Exhibit B) see also 2 CCH *Employment Practices Guide* ¶5281 (1974);
4) Articles such as that of Dr. William Mobley in the November-December, 1974 issue of The Personnel Administrator (Mobley, *Meeting Government Guidelines on Testing and Selection,* The Personnel Administrator Nov.-Dec. 1974, p. 42.

I have analyzed the views expressed by the A.P.I., the Ad Hoc Industry Group and Dr. Mobley and the statements attributed to them accurately reflect their views. The A.P.I. publication was issued to assist practitioners in the understanding of the intracies of complying with the EEOC Guidelines and, among other things, points out serious problems.

The report of the psychologists of the Ad Hoc Industry Group was presented on October 23, 1974 to the principals of the Equal Employment Opportunity Coordinating Council to show that their proposed Uniform Guidelines on Employee Selection Techniques perpetuated many of the serious problems embodied in the current EEOC Guidelines. That is, since the proposed Guidelines are similar in significant respects to the current Guidelines, the view of the Ad Hoc

* A comparison of my views with those of A.P.I., the Ad Hoc Industry Group and Dr. Mobley on the six key issues is set forth as Exhibit A to this affidavit.

Group concerning the proposed Guidelines also demonstrates the group's criticism of the current Guidelines. The fact that the EEOCC draft was sent back for further work indicates that the report had some impact.

Dr. Mobley's article is referred to because of its relevance and because Dr. Mobley has not been associated with the writer in any committees or working groups. Dr. Mobley is a psychologist presently employed by the University of South Carolina and with previous industrial research with PPG Industries.

The six issues used to illustrate severe problems associated with the Guidelines are:

Differential Validity
Technical Feasibility
Adverse Effect
Search for Alternatives
Job Analysis
Portability of Validation Studies

The list is not intended to be exhaustive. The six issues are intended as examples to refute the Justice Department and the EEOC position that ". . . the Guidelines accurately summarize the professionally accepted standards for test validation."

/s/ Charles Paul Sparks
Charles Paul Sparks

Subscribed and sworn to before
me this 15th day of May, 1975

/s/ Constance C. Fath
Notary Public

My commission expires: December 14, 1976

ATTACHMENT A

Technical Subcommittee of the Ad Hoc Industry Group-Psychologists

Dr. Paul A. Banas, Ford Motor Co.
Dr. Henry Brenner, First National City Bank
Dr. Patricia J. Dyer, IBM
Mr. Frank Erwin, Richardson, Bellows, Henry & Co.
Mr. Edward J. Karras, Firestone
Ms. Joyce Lawson, General Electric
Dr. Jack A. Parrish, General Motors
Mr. C. Paul Sparks, Exxon
Dr. Mary L. Tenopyr, American Telephone & Telegraph

American Petroleum Institute (A.P.I.) Project Subcommittee on Selection Techniques-Psychologists

Dr. Fred O. Carleton, Standard Oil Company (Ohio)
Mr. Ronald G. Croft, Standard Oil Company of California
Mr. James R. Glennon, Standard Oil Company of Indiana
Dr. Robert F. Morrison, Sun Oil Company
Mr. C. Paul Sparks, Humble Oil & Refining Company (now Exxon)

Advisory Committee on Selection and Testing, Office of Federal Contract Compliance-Psychologists

Dr. Lewis E. Albright, Kaiser Aluminum & Chemical Co.
Dr. Robert D. Dugan, International Telephone & Telegraph
Dr. Robert Guion, Bowling Green University
Dr. Raymond Katzell, New York University
Mr. Howard Lockwood, Lockheed Corporation
Mr. C. Paul Sparks, Humble Oil & Refining Co. (now Exxon)
Dr. Mary L. Tenopyr, U.S. Civil Service Commission
Dr. E. Belvin Williams, Columbia University

EXHIBIT A

DIFFERENTIAL VALIDITY

29 CFR § 1607.4 contains the statement "where technically feasible, a test should be validated for each minority group with which it is used; that is, any differential rejection rates that may exist, based on a test, must be relevant to performance on the jobs in question."

C.P. Sparks' View:

The requirement for differential validity is not based on any significant body of knowledge. As carefully controlled studies with adequate numbers of cases have been performed, the results consistently support the finding that the results predicted for one sub-group are substantially the same as those predicted for other subgroups. In addition, the number of cases required to obtain meaningful results will ordinarily be found only in jobs with low skill or ability requirements, even in the largest installations.

A.P.I. View:

Page 46 of the A.P.I. document says in part: "This paragraph is based on the proposition that it is quite likely that separate validity studies for minority and non-minority groups will often reveal different results for the two groups. Guidelines are given for the action to take when this occurs. Though technically feasible, few employers are likely to be willing to administer a test to one group and not to the other. Community relations are difficult to maintain at best without obvious differential treatment. Further, the few research studies available at this time are in great conflict as to the frequency with which this differential validity may actually exist. It will probably take years for the situation to be resolved."

Ad Hoc Industry View:

Separate validation studies are required for all race, sex, color, national origin and religious groups. This requirement ignores the substantial body of evidence that differences in validity by groups generally do not exist. Moreover, the requirement for multigroup studies, which are complicated and require large numbers of subjects, make compliance with the provision impossible for all employers. The best any employer can hope for is provisional compliance. The multigroup study requirement will have the effect of making employers abandon objective selection procedures.

Mobley View:

The fact that the guidelines devote considerable attention to the need for separate and differential prediction studies indicated that they were written with the belief that differential prediction was a probable hypothesis, i.e., that given test scores would be related to performance in *different and unfair* ways for minority as contrasted with non-minority subgroups.

How viable is this hypothesized need for differential prediction based on racial subgroups? While there has been too little strong research relevant to this point, there would appear to be a growing body of evidence suggesting that differential prediction may not be as prevelant as once thought and that in many cases it does not work to the disadvantage of minorities. (See e.g. Boehm, 1972; Crooks, L.A., 1972; Gael and Grant, 1972; Guinn, Tupes, and Allen, 1970; Ruch, 1972; Grant and Bray, 1971; Bray and Moses, 1972.)

TECHNICAL FEASIBILITY

29 CFR § 1607.4(b) defines "technically feasible" as having a sufficient number of minority individuals to achieve findings of statistical and practical significance, the opportunity to obtain unbiased job performance criteria, etc.

C.P. Sparks' View:

Technical feasibility is defined as having or obtaining a sufficient number of minority individuals to achieve findings of statistical and practical significance. Research psychologists have typically set this figure at 30, with 50 being a preferred number. However, this number should be composed of *appropriate* individuals, and numbers alone do not define appropriateness. For example, combining 19 long-service minority on-the-job learners with 11 short-service graduates of apprentice training would be completely inappropriate even though 30 minority job incumbents are available. Bias is assumed to be always against the minority incumbent. There is some research to show the opposite, particularly where the company is committed to an affirmative action goal.

A.P.I. View:

"Technically feasible" is first defined as "having or obtaining a sufficient number of minority individuals to achieve findings of statistical and practical significance." This number is not further defined. Research psychologists typically set this figure at 30, creating a requirement that can only be met by the largest companies. Even here, it can only be met in plants where there are large concentrations of employees performing the same or similar jobs. A refinery with fifty operators, fifteen of whom are Negro, cannot perform a "technically feasible" separate study on Negroes, and might be challenged even though the 30 percent Negro proportion might be higher than the Negro proportion in the area from which hiring is normally made. What happens after the employer demonstrates evidence of the absence of technical feasibility is not clear.

Ad Hoc Industry View:

The employer must prove lack of bias in a job performance measure or other criterion in order to conduct a validation

study. There are always performance differences; however, group differences in average job performance are not *prima facie* evidence of bias, but usually reflect genuine differences in job performance. An employer should always attempt to minimize the possibility of any bias in measurement of performance. However, to prove that performance differences are not a result of biased measurement is impossible.

Mobley View:

The term "technically feasible" is used in several passages of the guidelines and is defined as: having or obtaining sufficient sample sizes to achieve findings or statistical and practical significance, the opportunity to obtain unbiased job performance criteria, etc. What constitutes sufficient sample size and opportunity to collect unbiased criteria are obviously open to interpretation.

ADVERSE EFFECT

29 CFR § 1607.3 refers to "use of any test which adversely affects hiring, promotion, transfer, etc." and 1607.4 includes "Such evidence shall be examined for indications of possible discrimination, such as instances at higher rejection rates for minority candidates than non-minority candidates."

C.P. Sparks' View:

Where adverse effect is defined as hiring minorities in a proportion less than their applicant flow, the results of an employer's Affirmative Action recruiting is likely to be the trigger for application of the guidelines. In such an instance the employer may well hire more than the minority representation in the work force and still be having an adverse effect. In addition numerous consent decrees, affirmative action agreements and court orders have provided that applications will be routinely accepted from minorities even

when no job vacancy exists in order to provide for eventual hiring of such minorities.

A.P.I. View:

No precise statement.

Ad Hoc Industry View:

The definition of adverse impact which "triggers" the need for validation of selection procedures deals with processes rather than results. Regardless of how many members of protected groups are finally selected, the present definition of adverse impact results in the need for validation at every selection procedure step at which a greater proportion of any racial, ethnic or sex group is rejected. Under these conditions, employers, despite their hiring records, will be required to validate almost all of their selection procedures. Moreover, those employers who conduct aggressive affirmative action programs will be particularly affected. As long as the total selection process results in representative numbers of protected groups, with relevant skills, actually hired, the relationship of hires to applicants is irrelevant.

Mobley View:

What does adverse effect mean? One definition is based on a comparison of the percentage of minority applicants who qualify on the particular test in question. This might be called the "qualification rate" definition of adverse effect. If the average score for minorities on certain tests is lower than the average score for non-minorities, the percentage of minorities meeting any given qualifying score generally will be lower than the percentage of non-minorities meeting that qualifying score for these tests.

While qualification rate is a frequently cited basis for evaluating adverse effect, it would seem critical that those responsible for equal employment opportunity, both company

and government compliance investigators, look beyond qualification rate to *hiring* experience.

SEARCH FOR ALTERNATIVES

29 CFR § 1607.3(b) requires the researcher to demonstrate the unavailability of suitable alternative procedures if the test has an adverse effect, even though it had been validated and could be shown to have a high degree of utility. (emphasis added).

C.P. Sparks' View:

The search for alternatives which have less adverse effect presumes that the researcher not only knows of the existence of such alternatives but has access to studies or other evidence which demonstrate their validity. If such evidence were available the alternative would probably be used in the first place. Additionally, no consideration is given to other perameters. If a five-week company paid for training program prior to employment would have less adverse impact than a two-hour test and interview program, would the company be forced to adopt the latter?

A.P.I. View:

Page 40 says in part: "The Order [OFCC's] omits completely any reference to the demonstration of the unavailability of 'alternative suitable . . . procedures.' It is impossible to comply with this EEOC requirement without the availability of a complete taxonomy of *all* potential selection devices, a consensual index of the adverse discrimination generated by each device, and comparative validities for each device. This paragraph has been taken seriously by some EEOC examiners, and some employers have been told that they did not demonstrate the unavailability of suitable alternatives."

Ad Hoc Industry View:

The employer is required to search for alternative methods in the case of adverse impact. The requirements to the extent and the nature of this search are not clear.

Mobley View:

No precise position.

JOB ANALYSIS

29 CFR § 1607.5(b) (c) *includes, "whatever criteria are used they must represent major or critical work behaviors as revealed by careful job analyses."*

C.P. Sparks' View:

The universal requirement for a job analysis, particularly when a task-type procedure is suggested, is unnecessary and contributes nothing unless the researcher is validating against evaluations of task performance. Approval is given to use of other criteria such as training time, supervisory ratings, regularity of attendance and tenure. Having a detailed job analysis would certainly be meaningless if the criterion was turnover.

A.P.I. View:

The criteria of employee adequacy are to be fully described. This is reasonable since selection procedures may be aimed at accomplishing one or more of several goals and these should be specified. Several alternate criteria to actual work proficiency are suggested as acceptable, and this may be one of the most valuable permissions for the employer. In a job that has a short training period, and near-maximum proficiency can be obtained quickly, turnover may be the most valuable criterion to use, particularly since such a job is very likely to be turnover prone. On the other hand, in a

job that requires a protracted period of training before the incumbent is permitted freedom of action, success in training may be the most valuable criterion.

Ad Hoc Industry View:

The guidelines impose requirements for particular types of job analysis. In addition, job analysis is required when it is unnecessary, such as when an overall criterion of supervisors' ratings is to be used. The guidelines fail to recognize that reviews of job information used in conjunction with a validation study need to be based upon flexible requirements so that they are amenable to situational variables and the validation strategy contemplated. The guidelines should note that a direct assessment of knowledge, skills, and abilities required or a study of work outputs may often be more appropriate than a detailed task analysis. The job analysis requirements specified in the June 24 draft, while an improvement over those previously proposed, still are not adequate in terms of indicating the flexibility which must be permitted.

Mobley View:

No precise statement.

PORTABILITY OF VALIDATION STUDIES

29 CFR § 1607.4(C) (2) provides that evidence obtained in one unit may suffice for others. However, the section concludes, "Provided [*emphasis in original*] *that no significant differences exist between units, jobs, and applicant populations.*"

C.P. Sparks' View:

Organizations are permitted to use validation results obtained at one unit to justify use of the same materials in other units provided that no significant differences exist

between units, jobs, and applicant populations. Differences in education level of the members of a given community is sometimes given as an example of significant differences. However, if the jobs are comparable, the same reading, arithmetic, or other skills will be required in order to perform the job. Thus, the fact that different proportions of a community have a satisfactory level of these skills is irrelevant. Further, even though units might be quite different, the jobs might be quite the same, e.g., keypunch operator.

A.P.I. View:

This paragraph relieves the employer of the necessity of conducting several validation studies for the same job simply because the jobs happen to exist at different locations. A caveat is inserted, "no significant differences exist between units, jobs, and applicant populations." The first of these should create little difficulty in the case of refineries. The second may be more difficult because of organizational differences or different union contracts in the same company. The third may be the most difficult of all to establish, depending in part on the amount of specificity demanded. Different recruiting practices may result in seemingly different applicant populations, even though the areas from which applicants might normally be expected are quite similar in terms of ethnic mix and educational level. Carried to the extreme, it might be easier to perform the validation study than to prove that no significant differences exist among the applicant populations.

Ad Hoc Industry View:

Although the guidelines seemingly encourage cooperative validation efforts among employers, requirements with regard to sample composition and contextual variables make such cooperative efforts impossible. Also the anti-trust implications of cooperative efforts cannot be ignored.

Mobley View:

The guidelines provide that validity findings from one unit of a company or from other companies may be applied to other units, provided that *no significant differences* exist between units, jobs, applicant populations and other contextual variables. What constitutes *significant differences* in units, jobs, applicant populations and contextual variables are open to interpretation.

EXHIBIT B

September 27, 1974
General Criticisms of the June 24, 1974, Draft of
"Uniform Guidelines on Employee
Selection Procedures"

Ad Hoc Industry Group

The Ad Hoc Industry Group has reviewed the June 24, 1974 draft of the EEOCC "Uniform Guidelines on Employee Selection Procedures" and found them to be unworkable, to incorporate controversial and unscientific concepts, and likely to result in the abandonment of rigorous, objective selection procedures by American employers.

It should be understood that criticisms of the Ad Hoc Industry Group are presented in the context of a full endorsement of the aims and purposes of Title VII of the Civil Rights Act of 1964, as amended, and Executive Order 11246, as amended. There is also recognition that guidelines and regulations must be promulgated by the enforcing agencies to ensure uniform interpretation of these broadly drawn documents. In the area of testing, uniform interpretation is particularly required for both those who must comply and those who must enforce, since testing is complex and subject to emotional overtones.

The Ad Hoc Industry Group stands ready to contribute in any way to the development of a set of workable and technically acceptable guidelines whereby all parties will be able to evaluate whether any tests being used are violative of Title VII of the Act or the Executive Order.

The Ad Hoc Industry Group's criticisms of the guidelines were prepared by a technical committee of psychologists with a wide array of experience in business and academia. This committee believes that the interests of the public would best be served by replacing the present draft guidelines with a series of principles supplemented by an adden-

dum of interpretive material. The committee has developed 16 major criticisms of the current draft of the guidelines. Moreover, a detailed analysis of individual guideline sections has been prepared.

The general criticisms and committee recommendations are as follows:

1. The definition of adverse impact which "triggers" the need for validation of selection procedures deals with processes rather than results. Regardless of how many members of protected groups are finally selected, the present definition of adverse impact results in the need for validation at every selection procedure step at which a greater proportion of any racial, ethnic or sex group is rejected. Under these conditions, employers, despite their hiring records, will be required to validate almost all of their selection procedures. Moreover, those employers who conduct aggressive affirmative action programs will be particularly affected. As long as the total selection process results in representative numbers of protected groups, with relevant skills, actually hired, the relationship of hires to applicants is irrelevant.

RECOMMENDATION: Define adverse impact primarily in terms of end results so that there is no adverse impact when:

a. An employer selects from the applicant pool members of groups concerned in proportion to their representation in that pool; or

b. An employer's procedures result in an applicant flow of protected groups in excess of its representation in the relevant labor pool and final selection of such groups is in reasonable proportion to their availability in the relevant labor market; or

c. An employer meets any agreed upon selection goals (approved affirmative action plan, court order, consent decree, etc.) for the job or jobs in question.

2. The employer is required to search for alternative methods in the case of adverse impact. The requirements on the extent and the nature of this search are not clear.

RECOMMENDATION: Delete the requirement to search for alternatives.

3. Both validity and practical usefulness of selection procedures are required. The addition of the term "practical usefulness" goes beyond the mandate of job relatedness. Moreover, the term is subject to many interpretations and has no clear cut definition in the professional literature.

RECOMMENDATION: Eliminate all references to practical usefulness and similar concepts.

4. The actual and *de facto* guideline definitions of ethnic group are in conflict. The broader of these definitions includes all nationality, sex, race, color, and religious groups. Requirements related to treatment of ethnic group appear throughout the guidelines.

RECOMMENDATION: Throughout the guidelines, define racial or ethnic groups in terms of the EEO-1 categories.

5. The term "business necessity" is an important consideration in the determination of the permissibility of using selection procedures, and setting of standards on such procedures. This term is not defined in the guidelines.

RECOMMENDATION: Replace the term "business necessity" with "*bona fide* business, government, or union purpose."

6. When conditions make a typical criterion-related study infeasible, employers are required to validate by some other strategy. Since oftentimes criterion-related studies

are the only appropriate validation strategy, this requirement is confusing and totally impossible for employers to meet. The problem is further confounded by the requirement for separate validation studies for various groups. The guideline requirements can be interpreted to mean that when a criterion-related study is appropriate for the majority group, a content justification for the test must be prepared for every minority group for which a criterion-related study is not technically feasible. The requirement is not only impossible for employers to meet, but also dictates unsound psychological practice.

RECOMMENDATION: Eliminate the universal requirement for validation by some strategy. Also, remove many of the restrictions on the use of validation studies done by others and on cooperative validation, so that employers may use objective selection procedures for jobs having a small number of incumbents.

7. The guideline requirements are far more stringent than those of past orders and guidelines. These new requirements have been made retroactive to apply to past validation efforts which may have been in compliance with guidelines in effect when the work was done. None of these efforts would comply with the proposed guidelines.

RECOMMENDATION: Provided the job has not changed, allow for governmental acceptance of validation studies which were in compliance with guidelines in effect at the time the work was done and acceptance of work predating all guidelines provided that the work was technically adequate.

8. The numerous detailed restrictions on interim use of a selection procedure make it impossible for any employer to use, even provisionally, any selection procedure not in com-

plete compliance with the proposed guidelines. Since no known validation study is in compliance with the draft guidelines, it appears that the employer is allowed no objective selection procedures at all.

RECOMMENDATION: Allow interim use of procedures where the employer has evidence of validation studies done by others, or where validation efforts are underway or will be conducted in a reasonable period of time.

9. Although the guidelines seemingly encourage cooperative validation efforts among employers, requirements with regard to sample composition and contextual variables make such cooperative efforts impossible. Also the anti-trust implications of cooperative efforts cannot be ignored.

RECOMMENDATION: Allow cooperative validation at any time the jobs involved are comparable. Allow the use of others' validation studies when the jobs are comparable and the selection procedure involved has been shown to be valid against a criterion similar to that which the employer wishes to use. Obtain a clear position from the U. S. Department of Justice on the legality of cooperative efforts.

10. An employer who has denied equal employment opportunity to a group in the past must allow that group to compete for jobs under no more stringent selection standards than were in effect at the time the group was denied opportunity. Thus, since it could be argued that most employers have at some time denied opportunity to some group, an employer establishing an improved or more valid selection procedure could be prohibited from using it with certain groups.

RECOMMENDATION: Change the section to indicate clearly that private as well as public employers are allowed

to establish new, valid selection procedures. Replace the first sentence with this language from Griggs: "An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance."

11. A detailed, long range validation plan is required of every employer. This requirement is inconsistent with the provision that the employer need only validate when there is adverse impact. There are many questions about the need for and the proposed use of this plan. For example, what will be the government's action if the employer falls behind schedule relative to his or her own plan? It appears that the plan will be subject to various interpretations and will be challenged by various compliance officers and yet could not be used as a defense. Moreover, the specificity of the other sections of the guidelines obviates a detailed, highly specific plan. Perhaps unintentionally, the provision for such a plan results in an onerous and impractical reporting requirement for the employer.

RECOMMENDATION: Eliminate all references to required validation plans.

12. The employer must prove lack of bias in a job performance measure or other criterion in order to conduct a validation study. There are always performance differences; however, group differences in average job performance are not *prima facie* evidence of bias, but usually reflect genuine differences in job performance. An employer should always attempt to minimize the possibility of any bias in measurement of performance. However, to prove that performance differences are not a result of biased measurement is impossible.

RECOMMENDATION: Eliminate all requirements for

proof of unbiased criteria. However, encourage employers to consider the possibility of bias.

13. Separate validation studies are required for all race, sex, color, national origin and religious groups. This requirement ignores the substantial body of evidence that differences in validity by groups generally do not exist. Moreover, the requirements for multigroup studies, which are complicated and require large numbers of subjects, make compliance with the provision impossible for all employers. The best any employer can hope for is provisional compliance. The multigroup study requirement will have the effect of making employers abandon objective selection procedures.

RECOMMENDATION: Eliminate all requirements for differential prediction studies and for specific sample composition for other validation studies.

14. The absence of a specific identification of those selection procedures which are to be subject to validation research requirements, as compared to those which are not, significantly increases the possibility of misinterpretation by employers and enforcement agency personnel. Validation research requirements should be applied only to quantified methods. Other methods, such as the interview and reference checking, should be justified by a *bona fide* business, union, or government purpose.

RECOMMENDATION: Provide specific listings of those procedures which require validation and those which do not. Specify that non-quantified procedures should be justified on the basis of a *bona fide* business, union, or government purpose.

15. The guidelines impose requirements for particular types of job analysis. In addition, job analysis is required

when it is unnecessary, such as when an overall criterion of supervisors' ratings is to be used. The guidelines fail to recognize that reviews of job information used in conjunction with a validation study need to be based upon flexible requirements so that they are amenable to situational variables and the validation strategy contemplated. The guidelines should note that a direct assessment of knowledges, skills, and abilities required or a study of work outputs may often be more appropriate than a detailed task analysis. The job analysis requirements specified in the June 24 draft, while an improvement over those previously proposed, still are not adequate in terms of indicating the flexibility which must be permitted.

RECOMMENDATION: Allow for various types of review of job information, as required by the particular situation and the validation strategy contemplated.

16. The stipulation that examining for a higher level job will not be appropriate where the individual's progression to that job is not a "highly probable" occurrence sets a standard with which no employer can comply. Terms such as "highly probable" and "probable" are subject to individual interpretation and imply an almost automatic progression for every individual hired. Given differences in performance levels, individual preferences, and even normal turnover, every individual hired will not progress to a higher level position.

RECOMMENDATION: Permit examining for higher level jobs when a majority of those remaining employed progress to those jobs within a reasonable period of time.

In Summary

Taken section by section, subsection by subsection, line by line the proposed Guidelines (6/24/74) build to a set of

requirements and proscriptions which have the practical effect of eliminating objective measurement from the selection process. Given the typical structure and manning of business, industry, and government as it exists today, it is not technically feasible to meet many of the requirements even where the professional know-how exists. It is the interaction of the requirements and proscriptions which is the real deterrent to compliance. These requirements are frequently contradictory. Compliance with one requirement guarantees that another will be violated. Where this is not philosophically true, it is true in the actual world of employment because employers are dealing with real people, not with hypothetical cases for research.

Authors of the proposed Guidelines have indicated that controversial definitions and postulates will eventually be decided by the Federal courts. Employers have no desire to resort to the courts. This is particularly true because their day-to-day conflicts over interpretation of Guidelines such as these are with EEOC investigators and compliance officers of OFCC's compliance agencies. Furthermore, these investigators and compliance officers are generally guided by extensions of the original Guidelines through interpretations, advisories, implementing orders, etc., prepared by their own agencies and not coordinated with the progenitors of the original document.

The entire thrust of the proposed Guidelines is proscriptive, i.e., to prevent employers from discriminating against groups either overtly or inadvertently. Yet by placing so many restrictions on objective selection procedures, the employer is forced to use selection procedures which are not job related and which, in a sense, discriminate against the qualified, regardless of their group membership.

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ALBEMARLE PAPER CO. ET AL. *v.* MOODY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 74–389. Argued April 14, 1975—Decided June 25, 1975*

Respondents, a certified class of present and former employees, brought this action against petitioners, their employer, Albemarle Paper Co., and the employees' union, seeking injunctive relief against "any policy, practice, custom, or usage" at the plant violative of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, and after several years of discovery moved to add a class backpay demand. At the trial, the major issues were the plant's seniority system, its program of employment testing, and backpay. The District Court found that, following a reorganization under a new collective-bargaining agreement, the Negro employees had been "locked in the lower paying job classifications," and ordered petitioners to implement a system of plant-wide seniority. The court refused, however, to order backpay for losses sustained by the plaintiff class under the discriminatory system, on the ground that (1) Albemarle's breach of Title VII was found not to have been in "bad faith," and (2) respondents, who had initially disclaimed interest in backpay, had delayed making their backpay claim until five years after the complaint was filed, thereby prejudicing petitioners. The court also refused to enjoin or limit Albemarle's testing program, which respondents had contended had a disproportionate adverse impact on blacks and was not shown to be related to job performance, the court concluding that "personnel tests administered at the plant have undergone validation studies and have proven to be job related." Respondents appealed on

*Together with No. 74–428, *Halifax Local No. 425, United Papermakers & Paperworkers, AFL–CIO* v. *Moody et al.*, also on certiorari to the same court.

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the backpay and pre-employment tests issues. The Court of Appeals reversed the District Court's judgment. *Held:*

1. Given a finding of unlawful discrimination, backpay should be denied only for reasons that, if applied generally, would not frustrate the central statutory purposes manifested by Congress in enacting Title VII of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination. Pp. 6–14.

2. The absence of bad faith is not a sufficient reason for denying backpay, Title VII not being concerned with the employer's "good intent or absence of discriminatory intent," for "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation," *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 432. Pp. 15–16.

3. Whether respondents' tardiness and inconsistency in making their backpay demand were excusable and whether they actually prejudiced petitioners are matters that will be open to review by the Court of Appeals if the District Court, on remand, decides again to decline a backpay award. Pp. 16–18.

4. As is clear from *Griggs*, *supra*, and the Equal Employment Opportunity Commission's Guidelines for employers seeking to determine through professional validation studies whether employment tests are job related, such tests are impermissible unless shown, by professionally acceptable methods, to be "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." Measured against that standard, Albemarle's validation study is materially defective in that (1) it would not, because of the odd patchwork of results from its application, have "validated" the two general ability tests used by Albemarle for all the skilled lines of progression for which the two tests are, apparently, now required; (2) it compared test scores with subjective supervisorial rankings, affording no means of knowing what job-performance criteria the supervisors were considering; (3) it focused mostly on job groups near the top of various lines of progression, but the fact that the test of those employees working near the top of a line of progression score well on a test does not necessarily mean that the test permissibly measures the qualifications of new workers, entering lower level jobs; and (4) it dealt only with job-experienced, white workers, but the tests themselves are given to new job applicants,

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who are younger, largely inexperienced, and in many instances nonwhite. Pp. 18–28.

5. In view of the facts that during the appellate stages of this litigation Albemarle has apparently been amending its departmental organization and the use made of its tests; that issues of standards of proof for job relatedness and of evidentiary procedures involving validation tests have not until now been clarified; and that provisional use of tests pending new validation efforts may be authorized, the District Court on remand should initially fashion the necessary relief. Pp. 28–29.

474 F. 2d 134, vacated and remanded.

STEWART, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, WHITE, MARSHALL, and REHNQUIST, JJ., joined. MARSHALL and REHNQUIST, JJ., filed concurring opinions. BURGER, C. J., filed an opinion concurring in part and dissenting in part. BLACKMUN, J., filed an opinion concurring in the judgment. POWELL, J., took no part in the consideration or decision of the cases.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 74–389 AND 74–428

Albemarle Paper Company et al., Petitioners,
74–389 *v.*
Joseph P. Moody et al.

Halifax Local No. 425, United Papermakers and Paperworkers, AFL–CIO, Petitioner,
74–428 *v.*
Joseph P. Moody et al.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[June 25, 1975]

MR. JUSTICE STEWART delivered the opinion of the Court.

These consolidated cases raise two important questions under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U. S. C. §§ 2000 (e): First: When employees or applicants for employment have lost the opportunity to earn wages because an employer has engaged in an unlawful discriminatory employment practice, what standards should a federal district court follow in deciding whether to award or deny backpay? Second: What must an employer show to establish that pre-employment tests racially discriminatory in effect, though not in intent, are sufficiently "job related" to survive challenge under Title VII?

I

The respondents—plaintiffs in the District Court—are a certified class of present and former Negro employees at a paper mill in Roanoke Rapids, North Carolina; the petitioners—defendants in the District Court—are the plant's owner, the Albemarle Paper Company, and the plant employees' labor union, Halifax Local No. 425.[1] In August of 1966, after filing a complaint with the Equal Employment Opportunity Commission (EEOC), and receiving notice of their right to sue,[2] the respondents brought a class action in the United States District Court for the Eastern District of North Carolina, asking permanent injunctive relief against "any policy, practice, custom, or usage" at the plant that violated Title VII. The respondents assured the court that the suit involved no claim for any monetary awards on a class basis, but in June of 1970, after several years of discovery, the respondents moved to add a class demand for backpay. The court ruled that this issue would be considered at trial.

At the trial, in July and August of 1971, the major issues were the plant's seniority system, its program of employment testing, and the question of backpay. In its opinion of November 9, 1971, the court found that the petitioners had "strictly segregated" the plant's departmental "lines of progression" prior to January 1, 1964, reserving the higher paying and more skilled lines

[1] The paper mill has changed hands during this litigation, but these changes are irrelevant to the issues considered in this opinion, and the employer interest will be referred to throughout as Albemarle or the Company. The labor union is involved in only the backpay aspect of this litigation.

[2] The relevant procedures may be found at 42 U. S. C. § 2000e–5 (f)(1). See *McDonnell-Douglas Corp.* v. *Green*, 411 U. S. 792, 798; *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 44–45. See n. 8, *infra*.

for whites, — F. Supp. —. The "racial identifiability" of whole lines of progression persisted until 1968, when the lines were reorganized under a new collective-bargaining agreement. The court found, however, that this reorganization left Negro employees "locked in the lower paying job classifications," — F. Supp. —. The formerly "Negro" lines of progression had been merely tacked on to the bottom of the formerly "white" lines, and promotions, demotions, and layoffs continued to be governed—where skills were "relatively equal"—by a system of "job seniority." Because of the plant's previous history of overt segregation, only whites had seniority in the higher job categories. Accordingly, the court ordered the petitioners to implement a system of "plant-wide" seniority.

The court refused, however, to award backpay to the plaintiff class for losses suffered under the "job seniority" program.[3] The court explained:

> "In the instant case there was no evidence of bad faith non-compliance with the Act. It appears that the company as early as 1964 began active recruitment of blacks for its Maintenance Apprenticeship Program. Certain lines of progression were merged on its own initiative, and as judicial decisions expanded the then existing interpretations of the Act, the defendants took steps to correct the abuses without delay. . . .
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> "In addition, an award of back pay is equitable remedy. . . . The plaintiff's claim for back pay was

[3] Under Title VII backpay liability exists only for practices occurring after the effective date of the Act, July 2, 1965, and accrues only from a date two years prior to the filing of a charge with the EEOC. See 42 U. S. C. § 2000e–5 (g). Thus no award was possible with regard to the plant's pre-1964 policy of "strict segregation."

filed nearly five years after the institution of this action. It was not prayed for in the pleadings. Although neither party can be charged with deliberate dilatory tactics in bringing this cause to trial, it is apparent that the defendants would be substantially prejudiced by the granting of such affirmative relief. The defendants might have chosen to exercise unusual zeal in having this court determine their rights at an earlier date had they known that back pay would be at issue." — F. Supp. —.

The court also refused to enjoin or limit Albemarle's testing program. Albemarle had required applicants for employment in the skilled lines of progression to have a high school diploma and to pass two tests, the Revised Beta Examination, allegedly a measure of nonverbal intelligence, and the Wonderlic Test (available in alternate Forms A and B), allegedly a measure of verbal facility. After this Court's decision in *Griggs* v. *Duke Power Company*, 401 U. S. 424 (1971), and on the eve of trial, Albemarle engaged an industrial psychologist to study the "job relatedness" of its testing program. His study compared the test scores of current employees with supervisorial judgments of their competence in ten job groupings selected from the middle or top of the plant's skilled lines of progression. The study showed a statistically significant correlation with supervisorial ratings in three job groupings for the Beta test, in seven job groupings for either Form A or Form B of the Wonderlic Test, and in two job groupings for the required battery of both the Beta and the Wonderlic Test.[4] The respondents' experts challenged the reliability of these studies, but the court concluded:

"The personnel tests administered at the plant have undergone validation studies and have

[4] See pp. ———, *infra*.

been proven to be job related. The defendants have carried their burden of proof in proving that these tests are 'necessary for the safe and efficient operation of the business' and are, therefore, permitted by the Act. However, the high school education requirement used in conjunction with the testing requirement is unlawful in that the personnel tests alone are adequate to measure the mental ability and reading skills required for job classifications." — F. Supp. —.

The petitioners did not seek review of the court's judgment, but the respondents appealed the denial of a backpay award and the refusal to enjoin or limit Albemarle's use of pre-employment tests. A divided Court of Appeals for the Fourth Circuit reversed the judgment of the District Court, ruling that backpay should have been awarded and that use of the tests should have been enjoined, 474 F. 2d 134. As for backpay, the Court of Appeals held that an award could properly be requested after the complaint was filed and that an award could not be denied merely because the employer had not acted in "bad faith," *id.*, at 142:

"Because of the compensatory nature of a back pay award and the strong congressional policy embodied in Title VII, a district court must exercise its discretion as to back pay in the same manner it must exercise discretion as to attorney fees under Title II of the Civil Rights Act. . . . Thus, a plaintiff or a complaining class who is successful in obtaining an injunction under Title VII of the Act should ordinarily be awarded back pay unless special circumstances would render such an award unjust." *Newman* v. *Piggie Park Enterprises*, 390 U. S. 400 (1968). (Footnote omitted.)

As for the pre-employment tests, the Court of Appeals held, *id.*, at 138, that it was error

> "to approve a validation study done without job analysis, to allow Albemarle to require tests for 6 lines of progression where there has been no validation study at all, and to allow Albemarle to require a person to pass two tests for entrance into 7 lines of progression when only one of those tests was validated for that line of progression."

In so holding the Court of Appeals "gave great deference" to the "Guidelines on Employee Selection Procedures," 29 CFR Part 1607, which the EEOC has issued "as a workable set of standards for employers, unions and employment agencies in determining whether their selection procedures conform with the obligations of title VII. . . ." 29 CFR § 1607.1 (c).

We granted certiorari [5] because of an evident circuit conflict as to the standards governing awards of backpay [6] and as to the showing required to establish the "job relatedness" of pre-employment tests.[7]

II

Whether a particular member of the plaintiff class should have been awarded any backpay and, if so, how

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[5] — U. S. —. The Fourth Circuit initially granted a petition to rehear this case in banc. But that petition was ultimately denied, after this Court ruled, on a certified question, that "senior circuit judges who are members of the originally assigned division hearing a case are not authorized by Congress to participate in the determination to rehear that case in banc." *Moody* v. *Albemarle Paper Co.*, 417 U. S. 622, 624.

[6] For example, compare *Kober* v. *Westinghouse Electric Corp.*, 480 F. 2d 240 (CA3 1973), with *Pettway* v. *American Cast Iron Pipe Co.*, 494 F. 2d 211 (CA5 1974), and *Head* v. *Timken Roller Bearing Co.*, 486 F. 2d 870 (CA6 1973).

[7] For example, compare *Pettway* v. *American Cast Iron Pipe Co.*, *supra*, with *Castro* v. *Beecher*, 459 F. 2d 725 (CA1 1972).

much, are questions not involved in this review. The equities of individual cases were never reached. Though at least some of the members of the plaintiff class obviously suffered a loss of wage opportunities on account of Albemarle's unlawfully discriminatory system of job seniority, the District Court decided that *no* backpay should be awarded to *anyone* in the class. The court declined to make such an award on two stated grounds: the lack of "evidence of bad faith non-compliance with the Act," and the fact that "the defendants would be substantially prejudiced" by an award of backpay that was demanded contrary to an earlier representation and late in the progress of the litigation. Relying directly on *Newman* v. *Piggie Park Enterprises*, 390 U. S. 400, the Court of Appeals reversed, holding that backpay could be denied only in "special circumstances." The petitioners argue that the Court of Appeals was in error—that a district court has virtually unfettered discretion to award or deny backpay, and that there was no abuse of that discretion in this case.[8]

[8] The petitioners also contend that no backpay can be awarded to those unnamed parties in the plaintiff class who have not themselves filed charges with the EEOC. We reject this contention. The courts of appeals that have confronted the issue are unanimous in recognizing that backpay may be awarded on a class basis under Title VII without exhaustion of administrative procedures by the unnamed class members. See, *e. g.*, *Rosen* v. *Public Service Gas & Electric Co.*, 409 F. 2d 775, 780 (CA3 1969), 477 F. 2d 90, 95–96 (CA3 1973); *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 802 (CA4 1971); *United States* v. *Georgia Power Co.*, 474 F. 2d 906, 919–921 (CA5 1973); *Head* v. *Timken Roller Bearing Co.*, *supra*, 486 F. 2d, at 876 (CA6 1973); *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711, 719–721 (CA7 1969); *United States* v. *N. L. Industries, Inc.*, 479 F. 2d 354, 378–379 (CA8 1973). The Congress plainly ratified this construction of the Act in the course of enacting the Equal Employment Opportunity Act of 1972, Pub. L. 92–261, 86 Stat. 103. The House of Representatives passed a bill, H. R. 9247, that would have barred an award of backpay to any individual who "neither

Piggie Park Enterprises, supra, is not directly in point. The Court held there that attorneys' fees should "ordinarily" be awarded—*i. e.*, in all but "special circumstances"—to plaintiffs successful in obtaining injunctions against discrimination in public accommodations, under Title II of the Civil Rights Act of 1964. While the Act appears to leave Title II fee awards to the District Court's discretion, 42 U. S. C. § 2000a–3 (b), the Court determined that the great public interest in having injunctive actions brought could be vindicated only if successful plaintiffs, acting as "private attorneys general," were awarded attorneys' fees in all but very unusual circumstances. There is of course an equally strong public interest in having injunctive actions brought under Title VII, to eradicate discriminatory employment practices. But this interest can be vindicated by applying the *Piggie Park* standard to the *attorneys' fees* provision of Title VII, 42 U. S. C. § 2000e–5 (k), see *Northcross* v. *Board of Education,* 412 U. S. 427, 428. For guidance as to the granting and denial of *backpay,* one must, therefore, look elsewhere.

The petitioners contend that the statutory scheme

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filed a charge [with the EEOC] nor was named in a charge or amendment thereto." But the Senate Committee on Labor and Public Welfare recommended, instead, the re-enactment of the backpay provision without such a limitation, and cited with approval several cases holding that backpay was awardable to class members who had not personally filed, nor been named in, charges to the EEOC. S. Rep. No. 415, 92d Cong., 1st Sess., 27 (1971). See also 118 Cong. Rec. 4942 (1972). The Senate passed a bill without the House's limitation, 118 Cong Rec. 4944 (1972), and the Conference Committee adopted the Senate position. A Section-by-Section Analysis of the Conference Committee's resolution notes that "[a] provision limiting class actions was contained in the House bill and specifically rejected by the Conference Committee," 118 Cong. Rec. 7168, 7565 (1972). The Conference Committee bill was accepted by both chambers. 118 Cong. Rec. 7170, 7573.

provides no guidance, beyond indicating that backpay awards are within the District Court's discretion. We disagree. It is true that backpay is not an automatic or mandatory remedy; like all other remedies under the Act, it is one which the courts "may" invoke.[9] The scheme implicitly recognizes that there may be cases calling for one remedy but not another, and—owing to the structure of the federal judiciary—these choices are of course left in the first instance to the district courts. But such discretionary choices are not left to a court's "inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *United States* v. *Burr*, 25 Fed. Cas. 30, 35 (Marshall, C. J.). The power to award backpay was bestowed by Congress, as part of

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[9] 42 U. S. C. § 2000e–5 (g) provides:

"If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Backpay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the backpay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any backpay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e–3 (a) of this title."

a complex legislative design directed at an historic evil of national proportions. A court must exercise this power "in light of the large objectives of the Act," *Hecht Co.* v. *Bowles*, 321 U. S. 321, 331. That the court's discretion is equitable in nature, see *Curtis* v. *Loether*, 415 U. S. 189, 197, hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review. In *Mitchell* v. *DeMario Jewelry*, 361 U. S. 288, 292, this Court held, in the face of a silent statute, that district courts enjoyed the "historic power of equity" to award lost wages to workmen unlawfully discriminated against under § 17 of the Fair Labor Standards Act of 1938. The Court simultaneously noted that "the statutory purposes . . . (leave) little room for the exercise of discretion not to order reimbursement." *Id.*, at 296.

It is true that "[e]quity eschews mechanical rules . . . [and] depends on flexibility." *Holmberg* v. *Armbrecht*, 327 U. S. 392, 396. But when Congress invokes the Chancellor's conscience to further transcendant legislative purposes, what is required is the principled application of standards consistent with those purposes and not "equity [which] varies like the Chancellor's foot." [10] Important national goals would be frustrated by a regime of discretion that "produce[d] different results for breaches of duty in situations that cannot be differentiated in policy." *Moragne* v. *State Marine Lines*, 398 U. S. 375, 405.

The District Court's decision must therefore be measured against the purposes which inform Title VII. As the Court observed in *Griggs* v. *Duke Power Co.*, *supra*, 401 U. S., at 429–430, the primary objective was a prophylactic one:

"It was to achieve equality of employment oppor-

[10] Eldon, L. C., in *Gee* v. *Pritchard*, 2 Swanston, 414 (1818).

> tunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."

Backpay has an obvious connection with this purpose. If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." *United States* v. *N. L. Industries*, 479 F. 2d 354, 379.

It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination. This is shown by the very fact that Congress took care to arm the courts with full equitable powers. For it is the historic purpose of equity to "secur[e] complete justice," *Brown* v. *Swann*, 10 Pet. 497, 503; see also *Porter* v. *Warner Holding Co.*, 328 U. S. 395, 397–398. "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell* v. *Hood*, 327 U. S. 678, 684. Title VII deals with legal injuries of an economic character occasioned by racial or other anti-minority discrimination. The terms "complete justice" and "necessary relief" have acquired a clear meaning in such circumstances. Where racial discrimination is concerned, "the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisi-*

ana v. *United States*, 380 U. S. 145, 154. And where a legal injury is of an economic character,

> "[t]he general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former in to be measured. The injured party is to be placed as near as may be, in the situation he would have occupied if the wrong had not been committed." *Wicker* v. *Hoppock*, 6 Wall. 94, at 99.

The "make whole" purpose of Title VII is made evident by the legislative history. The backpay provision was expressly modeled on the backpay provision of the National Labor Relations Act.[11] Under that Act,

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[11] Section 10 (c) of the NLRA, 29 U. S. C. § 160 (c), provides that when the Labor Board has found that a person has committed "an unfair labor practice," the Board "shall issue" an order "requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter." The backpay provision of Title VII provides that when the court has found "an unlawful employment practice," it "may enjoin" the practice "and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay. . . ." 42 U. S. C. § 2000e-5 (g). The framers of Title VII stated that they were using the NLRA provision as a model. 110 Cong. Rec. 6549 (1964) (remarks of Sen. Humphrey); 110 Cong. Rec. 7214 (1964) (Interpretative Memorandum by Sens. Clark and Case); H. R. Rep. No. 914, 88th Cong., 1st Sess., 112 (1963). In early versions of the Title VII provision on remedies, it was stated that a court "may" issue injunctions, but "shall" order appropriate affirmative action. This anomaly was removed by Substitute Amendment No. 656, 110 Cong. Rec. 12814 & 12819. The framers regarded this as merely "a minor language change," 110 Cong. Rec. 12723–12724 (1964) (remarks of Sen. Humphrey). We can find here no intent to back away from the NLRA model or to denigrate in any way the status of backpay relief.

"[m]aking the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces." *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 197. See also *Nathason* v. *Labor Board*, 344 U. S. 25, 27; *NLRB* v. *Rutter-Rex Mfg. Co.*, 396 U. S. 258, 263. We may assume that Congress was aware that the Board, since its inception, has awarded backpay as a matter of course—not randomly or in the exercise of a standardless discretion, and not merely where employer violations are peculiarly deliberate, egregious or inexcusable.[12] Furthermore, in passing the Equal Employment Opportunity Act of 1972, Congress considered several bills to limit the judicial power to award backpay. These limiting efforts were rejected, and the backpay provision was re-enacted substantially in its original form.[13] A Section-by-Section

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[12] "The finding of an unfair labor practice and discriminatory discharge is presumptive proof that some back pay is owed by the employer," *NLRB* v. *Mastro Plastics Corp.*, 354 F. 2d 170, 178 (CA2 1965). While the backpay decision rests in the Labor Board's discretion, and not with the courts, *NLRB* v. *Rutter-Rex Mfg. Co.*, 396 U. S. 258, 263, the Board has from its inception pursued "a practically uniform policy with respect to these orders requiring affirmative action." NLRB Annual Report, Vol. I, p. 123 (1936).

"[I]n all but a few cases involving discriminatory discharges, discriminatory refusals to employ or reinstate, or discriminatory demotions in violation of Section 8, subdivision (3), of the Act, the Board has ordered the employer to offer reinstatement to employee discriminated against and to make whole such employee for any loss of pay he has suffered by reason of the discrimination."

NLRB Annual Report, Vol. 2, p. 148 (1937).

[13] As to the unsuccessful effort to restrict class actions for backpay, see n. 8, *supra*. In addition, the Senate rejected an amendment which would have required a jury trial in Title VII cases involving backpay, 118 Cong. Rec. 4917, 4919–4920 (1972) (remarks of Sens. Ervin and Javits), and rejected a provision that would have limited backpay liability to a date two years prior to filing a complaint in court. Compare H. R. 1746, which passed

Analysis introduced by Senator Williams to accompany the Conference Committee Report on the 1972 Act strongly reaffirmed the "make whole" purpose of Title VII:

> "The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706 (g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." 118 Cong. Rec. 7168 (1972).

As this makes clear, Congress' purpose in vesting a variety of "discretionary" powers in the courts was not to limit appellate review of trial courts, or to invite inconsistency and caprice, but rather to make possible the "fashion[ing] [of] the most complete relief possible."

It follows that, given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.[14] The courts of

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the House, with the successful Conference Committee bill, analyzed at 118 Cong. Rec. 7168 (1972), which adopted a substantially more liberal limitation, *i. e.*, a date two years prior to filing a charge with the EEOC. See 42 U. S. C. § 2000e–5 (g).

[14] It is necessary, therefore, that if a district court does decline to award backpay, it carefully articulate its reasons.

appeals must maintain a consistent and principled application of the backpay provision, consonant with the twin statutory objectives, while at the same time recognizing that the trial court will often have the keener appreciation of those facts and circumstances peculiar to particular cases.

The District Court's stated grounds for denying backpay in this case must be tested against these standards. The first ground was that Albemarle's breach of Title VII had not been in "bad faith." [15] This is not a sufficient reason for denying backpay. Where an employer *has* shown bad faith—by maintaining a practice which he knew to be illegal or of highly questionable legality—he can make no claims whatsoever on the Chancellor's conscience. But, under Title VII, the mere absence of bad faith simply opens the door to equity; it does not depress the scales in the employer's favor. If backpay were awardable only upon a showing of bad faith, the remedy would become a punishment for moral turpitude, rather than a compensation for workers' injuries. This would read the "make whole" purpose right out of Title VII, for a worker's injury is no less real simply because his employer did not inflict it in "bad faith." [16] Title VII is not concerned with the employer's "good intent or

[15] The District Court thought that the breach of Title VII had not been in "bad faith" because judicial decisions had only recently focused directly on the discriminatory impact of seniority systems. The court also noted that Albemarle had taken some steps to recruit black workers into one of its departments and to eliminate strict segregation through the 1968 departmental merger. — F. Supp. —.

[16] The backpay remedy of the NLRA on which the Title VII remedy was modeled, see n. 11, *supra*, is fully available even where the "unfair labor practice" was committed in good faith. See, *e. g.*, *NLRB* v. *Rutter-Rex Mfg. Co.*, 396 U. S. 258, 265; *American Machinery Corp.* v. *NLRB*, 424 F. 2d 1321, 1328–1330; *Laidlow Corp.* v. *NLRB*, 414 F. 2d 99, 107.

absence of discriminatory intent" for "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Griggs* v. *Duke Power Co., supra,* 401 U. S., at 432. See also *Watson* v. *City of Memphis,* 373 U. S. 526, at 535; *Wright* v. *Council of City of Emporia,* 407 U. S. 451, at 461–462.[17] To condition the awarding of backpay on a showing of "bad faith" would be to open an enormous chasm between injunctive and backpay relief under Title VII. There is nothing on the face of the statute or in its legislative history that justifies the creation of drastic and categorical distinctions between those two remedies.[18]

The District Court also grounded its denial of backpay on the fact that the respondents initially disclaimed any interest in backpay, first asserting their claim five years after the complaint was filed. The court concluded that the petitioners had been "prejudiced" by this conduct. The Court of Appeals reversed on the ground "that the broad aims of Title VII require that the issue of back pay be fully developed and determined even though it

[17] Title VII itself recognizes a complete, but very narrow, immunity for employer conduct shown to have been undertaken "in good faith, in conformity with, and in reliance on any written interpretation or opinion of the [Equal Employment Opportunity] Commission." 42 U. S. C. § 2000e–12 (b). It is not for the courts to upset this legislative choice to recognize only a narrowly defined "good faith" defense.

[18] We note that some courts have denied backpay, and limited their judgments to declaratory relief, in cases where the employer discriminated on sexual grounds in reliance on state "female protective" statutes that were inconsistent with Title VII. See, *e. g., Kober* v. *Westinghouse Electric Corporation,* 480 F. 2d 240; *LeBlanc* v. *Southern Bell Telephone and Telegraph Co.,* 460 F. 2d 1228; *Manning* v. *General Motors Corp.,* 466 F. 2d 812; *Rosenfeld* v. *Southern Pacific Company,* 444 F. 2d 1219. There is no occasion in this case to decide whether these decisions were correct. As to the effect of Title VII on state statutes inconsistent with it, see 42 U. S. C. § 2000e–7.

was not raised until the post-trial stage of litigation," 474 F. 2d, at 141.

It is true that Title VII contains no legal bar to raising backpay claims after the complaint for injunctive relief has been filed, or indeed after a trial on that complaint has been had.[19] Furthermore, Fed. Rule Civ. Proc. 54 (c) directs that

> "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

But a party may not be "entitled" to relief if its conduct of the cause has improperly and substantially prejudiced the other party. The respondents here were not merely tardy, but also inconsistent, in demanding backpay. To deny backpay because a *particular* cause has been prosecuted in an eccentric fashion, prejudicial to the other party, does not offend the broad purposes of Title VII. This is not to say, however, that the District Court's ruling was necessarily correct. Whether the petitioners were in fact prejudiced, and whether the respondents' trial conduct was excusable, are questions that will be open to review by the Court of Appeals, if the District Court, on remand, decides again to decline to make any award of backpay.[20] But the standard of review will be the familiar one of whether the District Court was "clearly erroneous" in its factual findings and whether it "abused" its traditional discretion to locate "a just re-

[19] See *Rosen* v. *Public Service Electric & Gas Co.*, *supra*, 409 F. 2d, at 780 n. 20; *Robinson* v. *Lorillard Corp.*, *supra*, 444 F. 2d, at 802–803; *United States* v. *Hayes International Corp.*, 456 F. 2d 112, 116 & 121.

[20] The District Court's stated grounds for denying backpay were, apparently, cumulative rather than independent. The District Court may, of course, reconsider its backpay determination in light of our ruling on the "good faith" question.

sult" in light of the circumstances peculiar to the case, *Lagnes* v. *Green*, 282 U. S. 531, 541. On these issues of procedural regularity and prejudice, the "broad aims of Title VII" provide no ready solution.

III

In *Griggs* v. *Duke Power Co.*, 401 U. S. 424, this Court unanimously held that Title VII forbids the use of employment tests that are discriminatory in effect unless the employer meets "the burden of showing that any given requirement [has] . . . a manifest relation to the employment in question." *Id.*, at 432.[21] This burden arises, of course, only after the complaining party or class has made out a prima facie case of discrimination—has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants. See *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 802. If an employer does then meet the burden of proving that its tests are "job related," it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in "efficient and trustworthy workmanship." *Id.*, at 801. Such a showing would be evidence that the employer was using its tests merely as a "pretext" for discrimination. *Id.*, at 804–805. In the present case, however, we are concerned only with the question whether Albemarle has shown its tests to be job related.

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[21] In *Griggs*, the Court was construing 42 U. S. C. § 2000e–2 (h), which provides in pertinent part that it shall not "be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin."

The concept of job relatedness takes on meaning from the facts of the *Griggs* case. A power company in North Carolina had reserved its skilled jobs for whites prior to 1965. Thereafter, the company allowed Negro workers to transfer to skilled jobs, but all transferees—white and Negro—were required to attain national median scores on two tests,

> "the Wonderlic Personnel Test, which purports to measure general intelligence, and the Bennett Mechanical Comprehension Test. Neither was directed or intended to measure the ability to learn to perform a particular job or category of jobs . . . . Both were adopted, as the Court of Appeals noted, without meaningful study of their relationship to job-performance ability. Rather, a vice president of the Company testified, the requirements were instituted on the Company's judgment that they generally would improve the overall quality of the work force." *Giggs* v. *Duke Power Co., supra,* at 428 and 431.

The Court took note of "the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as fixed measures of capability," and concluded:

> "Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance . . . . What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract." *Id.,* at 433 and 436.

Like the employer in *Griggs,* Albemarle uses two general ability tests, the Beta Examination, to test nonverbal

intelligence, and the Wonderlic Test (Forms A and B), the purported measure of general verbal facility which was also involved in the *Griggs* case. Applicants for hire into various skilled lines of progression at the plant are required to score 100 on the Beta Exam and 18 on one of the Wonderlic Test's two, alternate forms.[22]

The question of job relatedness must be viewed in the context of the plant's operation and the history of the testing program. The plant, which now employs about 650 persons, converts raw wood into paper products. It is organized into a number of functional departments, each with one or more distinct lines of progression, the theory being that workers can move up the line as they acquire the necessary skills. The number and structure of the lines has varied greatly over time. For many years, certain lines were themselves more skilled and paid higher wages than others, and until 1964 these skilled lines were expressly reserved for white workers. In 1968, many of the unskilled "Negro" lines were "end-tailed" on to skilled "white" lines, but it apparently remains true that at least the top jobs in certain lines require greater skills than the top jobs in other lines. In this sense, at least, it is still possible to speak of relatively skilled and relatively unskilled lines.

In the 1950's while the plant was being modernized with new and more sophisticated equipment, the company introduced a high school diploma requirement for entry into the skilled lines. Though the company soon concluded that this requirement did not improve the quality of the labor force, the requirement was continued until the District Court enjoined its use. In the late 1950's, the company began using the Beta Examination and the Bennett Mechanical Comprenhension Test (also involved in the *Griggs* case) to screen applicants

[22] Albemarle has informed us that it has now reduced the cut-off score to 17 on the Wonderlic Test.

for entry into the skilled lines. The Bennett test was dropped several years later, but use of the Beta test continued.[23]

The company added the Wonderlic Tests in 1963, for the skilled lines, on the theory that a certain verbal intelligence was called for by the increasing sophistication of the plant's operations. The company made no attempt to validate the test for job relatedness,[24] and simply adopted the national "norm" score of 18 as a cut-off point for new job applicants. After 1964, when it discontinued overt segregation of the lines of progression, the company allowed Negro workers to transfer to the skilled lines if they could pass the Beta and Wonderlic Tests, but few succeeded in doing so. Incumbents in the skilled lines, some of whom had been hired before adoption of the tests, were not required to pass them to retain their jobs or their promotion rights. The record

[23] While the Company contends that the Bennett and Beta Tests were "locally validated" when they were introduced, no record of this validation was made. Plant officials could recall only the barest outlines of the alleged validation. Job relatedness cannot be proven through vague and insubstantiated hearsay.

[24] As explained by the responsible plant official, the Wonderlic Test was chosen in rather casual fashion:

"I had had experience with using the Wonderlic before, which is a short form Verbal Intelligence Test, and knew that it had, uh, probably more validation studies behind it than any other short form Verbal Intelligence Test. So, after consultation we decided to institute the Wonderlic, in addition to the Beta, in view of the fact that the mill had changed quite a bit and it had become exceedingly more complex in operation . . . . We did not, uh, validate it, uh, locally, primarily, because of the, the expense of conducting such a validation, and there were some other considerations, such as, uh, we didn't know whether we would get the co-operation of the employees that we'd need to validate it against in taking the test, and we certainly have to have that, so, we used National Norms and on my suggestion after study of the Wonderlic and Norms had been established nationally for skilled jobs, we developed a, uh, cut-off score of eighteen (18)."

shows that a number of white incumbents in high ranking job groups could not pass the tests.[25]

Because departmental reorganization continued up to the point of trial, and has indeed continued since that point, the details of the testing program are less than clear from the record. The District Court found that, since 1963, the Beta and Wonderlic tests have been used in 13 lines of progression, within eight departments. Albemarle contends that at present the tests are used in only eight lines of progression, within four departments.

Four months before this case went to trial, Albemarle engaged an expert in industrial psychology to "validate" the job relatedness of its testing program. He spent a half day at the plant and devised a "concurrent validation" study, which was conducted by plant officials, without his supervision. The expert then subjected the results to statistical analysis. The study dealt with 10 job groupings, selected from near the top of nine of the lines of progression.[26] Jobs were grouped together solely by their proximity in the line of progression; no attempt was made to analyze jobs in terms of the particular skills they might require. All, or nearly all, employees in the selected groups participated in the study—105 employees

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[25] In the course of a 1971 validation effort, see pp. —, *infra*, test scores were accumulated for 105 incumbent employees (101 of whom were white) working in relatively high ranking jobs. Some of these employees apparently took the tests for the first time as part of this study. The Company's expert testified that the test cutoff scores originally used to screen these incumbents for employment or promotion "couldn't have been . . . very high scores because some of these guys tested very low, as low as 8 on the Wonderlic test and as low as 95 in the Beta. They couldn't have been using very high cut-off scores or they wouldn't have these low testing employees."

[26] See the charts appended to this opinion. It should be noted that testing is no longer required for some of the job groups tested.

in all, but only four Negroes. Within each job grouping, the study compared the test scores of each employee with an independent "ranking" of the employee, relative to each of his coworkers, made by two of the employee's supervisors. The supervisors, who did not know the test scores, were asked to

> "determine which ones they felt irrespective of the job that they were actually doing, but in their respective jobs, did a better job than the person they were rating against. . . ." [27]

For each job grouping, the expert computed the "Phi coefficient" of statistical correlation between the test scores and an average of the two supervisorial rankings. Consonant with professional conventions, the expert regarded as "statistically significant" any correlation that could have occurred by chance only five times, or less, in 100 trials.[28] On the basis of these results, the District Court found that "[t]he personnel tests administered at the plant have undergone validation studies and have been proven to be job related." Like the Court of Appeals, we are constrained to disagree.

The EEOC has issued "Guidelines" for employers seeking to determine, through professional validation studies, whether their employment tests are job related. 29 CFR Part 1607 (1974). These Guidelines draw upon and make reference to professional standards of test validation established by the American Psychological Association.[29] The EEOC Guidelines are not administrative

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[27] This "standard" for the ranking was described by the plant official who oversaw the conduct of the study.

[28] The results of the study are displayed on Chart A appended to this opinion.

[29] American Psychological Association, Standards for Educational and Psychological Tests and Manuals (1966). A volume of the same title, containing modifications, was issued in 1974. The EEOC

"regulations" promulgated pursuant to formal procedures established by the Congress. But, as this Court has heretofore noted, they do constitute "[t]he administrative interpretation of the Act by the enforcing agency," and consequently they are "entitled to great deference." *Griggs* v. *Duke Power Co., supra,* 401 U. S., at 433–434. See also *Espinoza* v. *Farah Mfg. Co.,* 414 U. S. 86, 94.

The message of these Guidelines is the same as that of the *Griggs* case—that discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." 29 CFR § 1607.4 (c).

Measured against the Guidelines, Albemarle's validation study is materially defective in several respects:

(1) Even if it had been otherwise adequate, the study would not have "validated" the Beta and Wonderlic test battery for all of the skilled lines of progression for which the two tests are, apparently, now required. The study showed significant correlations for the Beta Exam in only three of the eight lines. Though the Wonderlic Test's Form A and Form B are in theory identical and interchangeable measures of verbal facility, significant correlations for one Form but not for the other were obtained in four job groupings. In two job groupings neither Form showed a significant correlation. Within some of the lines of progression, one Form was found acceptable for some job groupings but not for others. Even if the study were otherwise reliable, this odd patchwork of results would not entitle Albemarle to impose its testing program under the Guidelines. A test may

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Guidelines refer to the APA Standards at 29 C. F. R. § 1607.5 (a). Very similar guidelines have been issued by the Secretary of Labor for the use of federal contractors. 41 CFR § 60–3.1 *et seq.* (1974).

be used in jobs other than those for which it has been professionally validated only if there are "no significant differences" between the studied and unstudied jobs. 29 CFR § 1607.4 (c)(2). The study in this case involved no analysis of the attributes of, or the particular skills needed in, the studied job groups. There is accordingly no basis for concluding that "no significant differences" exist among the lines of progression, or among distinct job groupings within the studied lines of progression. Indeed, the study's checkered results appear to compel the opposite conclusion.

(2) The study compared test scores with subjective supervisorial rankings. While they allow the use of supervisorial rankings in test validation, the Guidelines quite plainly contemplate that the rankings will be elicited with far more care than was demonstrated here.[30] Albemarle's supervisors were asked to rank employees by a "standard" that was extremely vague and fatally open to divergent interpretations. Each "job grouping"

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[30] The Guidelines provide, at 29 CFR § 1607.5 (b)(3) and (4):

"(3) The work behaviors or other criteria of employee adequacy which the test is intended to predict or identify must be fully described; and, additionally, in the case of rating techniques, the appraisal form(s) and instructions to the rater(s) must be included as a part of the validation evidence. Such criteria may include measures other than actual work proficiency, such as training time, supervisory ratings, regularity of attendance and tenure. Whatever criteria are used they must represent major or critical work behaviors as revealed by careful job analyses.

"(4) In view of the possibility of bias inherent in subjective evaluations, supervisory rating techniques should be carefully developed, and the ratings should be closely examined for evidence of bias. In addition, minorities might obtain unfairly low performance criterion scores for reasons other than supervisor's prejudice, as when, as new employees, they have had less opportunity to learn job skills. The general point is that all criteria need to be examined to insure freedom from factors which would unfairly depress the scores of minority groups."

contained a number of different jobs, and the supervisors were asked, in each grouping, to

> "determine which ones [employees] they felt irrespective of the job that they were actually doing, but in their respective jobs, did a better job than the person they were rating against . . . ." [31]

There is no way of knowing precisely what criteria of job performance the supervisors were considering, whether each of the supervisors was considering the same criteria—or whether, indeed, any of the supervisors actually applied a focused and stable body of criteria of any kind.[32] There is, in short, simply no way to determine whether the criteria *actually* considered were sufficiently related to the Company's legitimate interest in job-specific ability to justify a testing system with a racially discriminatory impact.

(3) The company's study focused, in most cases, on job groups near the top of the various lines of progression. In *Griggs* v. *Duke Power Co., supra,* the Court left open "the question whether testing requirements that take into account capability for the next succeeding position or related future promotion might be utilized upon a showing that such long-range requirements fulfill a genuine business need." 401 U. S., at 432. The Guidelines take a sensible approach to this issue, and we now endorse it:

> "If job progression structures and seniority provisions are so established that new employees will probably, within a reasonable period of time and in a great majority of cases, progress to a higher level,

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[31] See n. 27, *supra.*

[32] It cannot escape notice that Albemarle's study was conducted by plant officials, without neutral, on-the-scene oversight, at a time when this litigation was about to come to trial. Studies so closely controlled by an interested party in litigation must be examined with great care.

> it may be considered that candidates are being evaluated for jobs at that higher level. However, where job progression is not so nearly automatic, or the time span is such that higher-level jobs or employees' potential may be expected to change in significant ways, it shall be considered that candidates are being evaluated for a job at or near the entry level." 29 CFR § 1607.4 (c)(1).

The fact that the best of those employees working near the top of a line of progression score well on a test does not necessarily mean that that test, or some particular cutoff score on the test, is a permissible measure of the minimal qualifications of new workers, entering lower level jobs. In drawing any such conclusion, detailed consideration must be given to the normal speed of promotion, to the efficacy of on-the-job training in the scheme of promotion, and to the possible use of testing as a promotion device, rather than as a screen for entry into low-level jobs. The District Court made no findings on these issues. The issues take on special importance in a case, such as this one, where incumbent employees are permitted to work at even high-level jobs without passing the company's test battery. See 29 CFR § 1607.11.

(4) Albemarle's validation study dealt only with job-experienced, white workers; but the tests themselves are given to new job applicants, who are younger, largely inexperienced, and in many instances nonwhite. The Standards of the American Psychological Association state that it is "essential" that

> "[t]he validity of a test should be determined on subjects who are at the age or in the same educational or vocational situation as the persons for whom the test is recommended in practice." [33]

[33] APA Standards, *supra*, n. 29, at ¶ C 5.4.

The EEOC Guidelines likewise provide that "[d]ata must be generated and results separately reported for minority or non-minority groups wherever technically feasible." 29 CFR § 1607.5 (b)(5). In the present case, such "differential validation" as to racial groups was very likely not "feasible," because years of discrimination at the plant have insured that nearly all of the upper level employees are white. But there has been no clear showing that differential validation was not feasible for lower-level jobs. More importantly, the Guidelines provide:

> "If it is not technically feasible to include minority employees in validation studies conducted on the present work force, the conduct of a validation study without minority candidates does not relieve any person of his subsequent obligation for validation when inclusion of minority candidates becomes technically feasible." 29 CFR § 1607.5 (b)(1).
>
> . . . . .
>
> "[E]vidence of satisfactory validity based on other groups will be regarded as only provisional compliance with the guidelines pending separate validation of the test for the minority groups in question." 29 CFR § 1607.5 (b)(5).

For all these reasons, we agree with the Court of Appeals that the District Court erred in concluding that Albemarle had proved the job relatedness of its testing program and that the respondents were consequently not entitled to equitable relief. The outright reversal by the Court of Appeals implied that an injunction should immediately issue against all use of testing at the plant. Because of the particular circumstances of this case, however, it appears that the more prudent course is to leave to the District Court the precise fashioning of the neces-

sary relief in the first instance. During the appellate stages of this litigation, the plant has apparently been amending its departmental organization and the use made of its tests. The appropriate standard of proof for job relatedness has not been clarified until today. Similarly, the respondents have not until today been specifically apprised of their opportunity to present evidence that even validated tests might be a "pretext" for discrimination in light of alternative selection procedures available to the company. We also note that the Guidelines authorize provisional use of tests, pending new validation efforts, in certain very limited circumstances. 29 CFR § 1607.9. Whether such circumstances now obtain is a matter best decided, in the first instance, by the District Court. That court will be free to take such new evidence, and to exercise such control of the company's use and validation of employee selection procedures, as are warranted by the circumstances and by the controlling law.

Accordingly, the judgment is vacated, and these cases are remanded to the District Court for proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL did not participate in the consideration or decision of these cases.

CHART A
Results of Validation Study

Job Group	*N*	*Beta*	*Test* *W–A*	*W–B*
1. Caustic Operator, Lime Kiln Operators	8	.25	1.00**	.47
2. C. E. Recovery Operator, C. E. Recovery 1st Helpers & Evaporator Operators	12	.64**	.32	.17
3 Wood Yard: Long Log Operators, Log Stackers, Small Equipment Operators & Oilers	14	.00	1.00**	.72*
4. Technical Services: B Mill Shift Testmen, Additive men, General Lab. Testmen, General Lab. asst., A Mill Testmen, Samplemen.		.50*	.75**	.64*
5. B Paper Mill: Machine Tenders and Back Tenders	16	.00	.50**	.34
6. B Paper Mill: Stock Room Operator, Stock Room 1st Helper	8	—.50	.00	.00
7. B Paper Mill: 3rd Hands, 4th Hands & 5th Hands	21	.43	.81**	.60**
8. Wood Yard: Chopper Unloader, Chipper Operator, No. 2 Chain Operator	6	.76*	—.25	1.00**
9. Pulp Mill: Stock Room Operator, Stock Room 1st Helpers	8	.50	.80*	.76*
10. Power Plant: Power Plant Operator, Power Plant 1st Helper, Power Plant 2nd Helper	12	.34	.75**	.66*

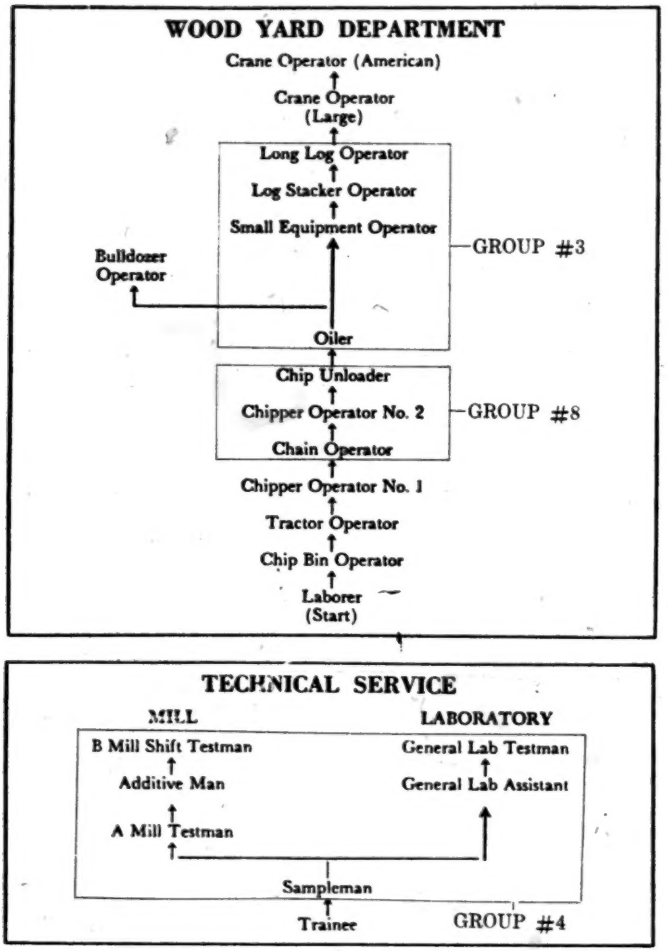
NOTE

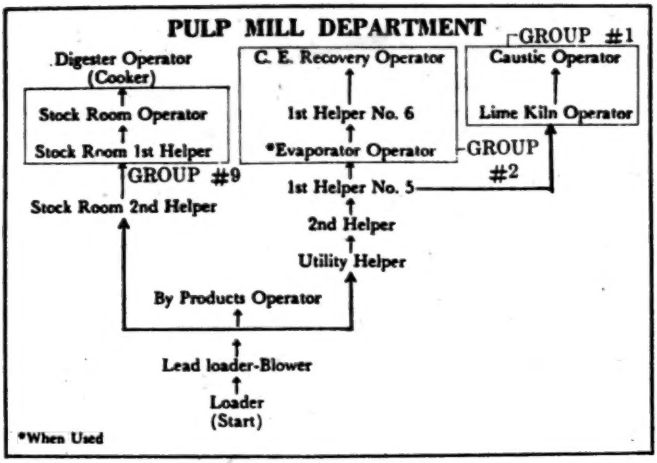
The job groups are identified in Chart B. N indicates the number of employees tested. A single (double) asterisk indicates the "Phi" coefficient of correlation, shown on the chart, is statistically significant at a 95% (99%) level of confidence. The other coefficients are not statistically significant.

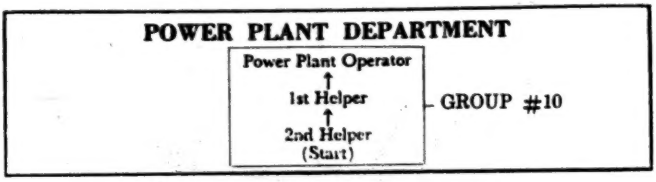
CHART B

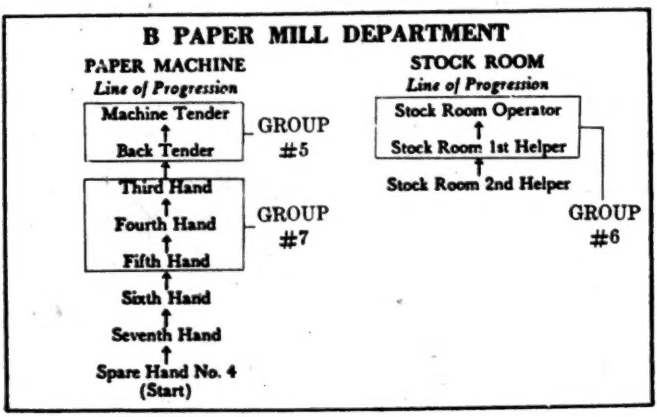
Albemarle's Skilled Lines of Progression

NOTE: The numbered job groups are those examined in the validation study summarized in Chart A. Testing is no longer required for entry into the Woodyard Department.




PULP MILL DEPARTMENT
GROUP #1
Digester Operator (Cooker)
C. E. Recovery Operator
Caustic Operator
Stock Room Operator
Stock Room 1st Helper
1st Helper No. 6
*Evaporator Operator
Lime Kiln Operator
GROUP #2
GROUP #9
1st Helper No. 5
Stock Room 2nd Helper
2nd Helper
Utility Helper
By Products Operator
Lead loader-Blower
Loader (Start)
*When Used


POWER PLANT DEPARTMENT
Power Plant Operator
1st Helper
2nd Helper (Start)
GROUP #10


B PAPER MILL DEPARTMENT
PAPER MACHINE
Line of Progression
Machine Tender
Back Tender
GROUP #5
Third Hand
Fourth Hand
Fifth Hand
GROUP #7
Sixth Hand
Seventh Hand
Spare Hand No. 4 (Start)
STOCK ROOM
Line of Progression
Stock Room Operator
Stock Room 1st Helper
Stock Room 2nd Helper
GROUP #6

SUPREME COURT OF THE UNITED STATES

No. 74–107

Peter Preiser, Etc., et al., Petitioners, *v.* James Newkirk. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June 25, 1975]

MR. JUSTICE MARSHALL, concurring.

I join this opinion only because for some reason petitioner did not file this case as a class action. As a result, the State of New York by releasing the other three named plaintiffs, transfering petitioner back to Wallkill after the District Court action, and finally to a lesser correctional facility after the Court of Appeals acted, thereby made the case moot.

SUPREME COURT OF THE UNITED STATES

Nos. 74–389 AND 74–428

Albemarle Paper Company et al., Petitioners,
74-389 *v.*
Joseph P. Moody et al.

Halifax Local No. 425, United Papermakers and Paperworkers, AFL–CIO, Petitioner,
74–428 *v.*
Joseph P. Moody et al.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[June 25, 1975]

MR. JUSTICE REHNQUIST, concurring.

I join the opinion of the Court. The manner in which 42 U. S. C. § 2000 (e) is construed has important consequences not only as to the circumstances under which backpay may be awarded, but also as to the method by which any such award is to be determined.

To the extent that an award of backpay were to be analogized to an award of damages, such an award upon proper proof would follow virtually as a matter of course from a finding that an employer had unlawfully discriminated contrary to the provisions of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103. Plaintiffs would be entitled to the benefit of the rule enunciated in *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251, 265:

> " 'The constant tendency of the courts was to find some way in which damages can be awarded where

> a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery' for a proven invasion of the plaintiff's rights. *Story Parchment Co.* v. *Patterson Co.*, [282 U. S. 555], 565."

But precisely to the extent that an award of backpay is thought to flow as a matter of course from a finding of wrongdoing, and thereby becomes virtually indistinguishable from an award for damages, the question (not raised by either party to this case, and therefore quite properly not discussed in the Court's opinion), of whether either party may demand a jury trial under the Seventh Amendment becomes critical. We said in *Curtis* v. *Loether*, 415 U. S. 189, 197 (1974) in explaining the difference between the provision for damages under § 812 of the Civil Rights Act of 1968 and the authorization for the award of backpay which we treat here:

> "In Title VII cases, also, the courts have relied on the fact that the decision whether to award back pay is committed to the discretion of the trial judge. There is no comparable discretion here: If a plaintiff proves unlawful discrimination and actual damages, he is entitled to judgments for that amount . . . . Whatever may be the merit of the 'equitable' characterization in Title VII cases, there is surely no basis for characterizing the award of compensatory and punitive damages here as equitable relief." *Id.*, at 197. (Footnote omitted.)

In *Curtis, supra*, the Court further quoted the description of the Seventh Amendment in Justice Story's opinion for this Court in *Parsons* v. *Bedford*, 3 Pet. 433, 446–447 (1830), to the effect that:

> "In a just sense, the amendment then may well be construed to embrace all suits which are not of

> equity and admiralty jurisdiction, whatever might be the peculiar form which they may assume to settle legal rights."

To the extent, then, that the District Court retains substantial discretion as to whether or not to award backpay not withstanding a finding of unlawful discrimination, the nature of the jurisdiction which the Court exercises is equitable, and under our cases neither party may demand a jury trial. To the extent that discretion is replaced by awards which follow as a matter of course from a finding of wrongdoing, the action of the Court in making such awards could not be fairly characterized as equitable in character, and would quite arguably be subject to the provisions of the Seventh Amendment.

Thus I believe that the broad latitude which the Court's opinion reposes in the district courts in the decision as to whether backpay shall be awarded is not only consistent with the statute, but is supported by policy considerations which would favor the more expeditious disposition which may be made of numerous claims on behalf of frequently large classes by a court sitting without a jury. As the Court states, *ante,* at 12, the backpay remedy provided by Title VII is modeled on the remedial provisions of the NLRA. This Court spoke to the breadth of the latter provision in *Phelps Dodge* v. *NLRB,* 313 U. S. 177, 198 (1941) when it said:

> "We must avoid the rigidities of an either-or rule. The remedy of back pay, it must be remembered, is entrusted to the Board's discretion; it is not mechanically compelled by the Act. And in applying its authority over back pay awards, the Board has not used stereotyped formulas but has availed itself of the freedom given it by Congress under the Act to obtain just results in diverse, complicated situations."

I agree, nonetheless, with the Court that the District Court should not have denied backpay in this case simply on the ground that petitioner's breach of Title VII had not been in "bad faith." Good faith is a necessary condition for obtaining equitable consideration, but in view of the narrower "good faith" defense created by statute, 42 U. S. C. §§ 2000 (e)–12 (b), it is not for this Court to expand such a defense beyond those situations to which Congress had made it applicable. I do not read the Court's opinion to say, however, that the facts upon which the District Court based its conclusion, *ante*, at 15 n. 15, would not have supported a finding that the conduct of petitioner was reasonable under the circumstances as well as being simply in good faith. Nor do I read the Court's opinion to say that such a combination of factors might not, in appropriate circumstances, be an adequate basis for denial of backpay. See *Shaeffer* v. *San Diego Yellow Cabs, Inc.*, 462 F. 2d 1002, 1006 (CA9 1972); *United States* v. *Georgia Power Co.*, 474 F. 2d 906, 922 (CA5 1973).

A cursory canvass of the decisions of the district courts and courts of appeals who confront these problems much more often than we do suggests that the most frequently recurring problem in this area is the difficulty of ascertaining a sufficient causal connection between the employer's conduct properly found to have been in violation of the statute and an ascertainable amount of backpay lost by a particular claimant as a result of that conduct. *United States* v. *St. Louis & S. F. R. Co.*, 464 F. 2d 301, 311 (CA8 1972), cert. denied, 409 U. S. 1104 (1972). The Court of Appeals for the Eighth Circuit aptly described the difficulty of fashioning an award of backpay in the circumstances before it, and upheld the District Court's refusal to award backpay, in *Norman* v.

Missouri Pacific Railroad, 497 F. 2d 594, 597 (CA8 1974), cert. denied, — U. S. — (1975):

> "No standard could determine the right to back pay itself nor the date from which to compute any right to back pay. Courts that have found back pay awards to be appropriate remedies in Title VII actions have generally recognized that such awards should be limited to actual damages . . ."

As the Court recognizes, *ante*, at 17–18, another factor presented in the instant case which is relevant to the District Court's exercise of discretion is the possible detrimental reliance of petitioners on prior representations of respondents that they were not seeking classwide backpay. In 1966 respondents in replying to a motion for summary judgment expressly represented to the District Court that they had no interest in classwide backpay:

> "It is important to understand the exact nature of the relief sought by plaintiffs. No money damages are sought for any member of the class not before the court. . . . [T]he matter of specific relief for other class members is not before the court." App. at 13–14.

Five years later, respondents reversed their position and asserted a claim for classwide backpay. Petitioners have argued here and below that they reasonably relied to their detriment on respondents' statement in numerous ways including an interim sale of the mill at a price which did not take into account the ruinous liability with which the new owners are now faced, failure to investigate and prepare defenses to individual backpay claims which are now nine years old, and failure to speed resolution of this lawsuit. 474 F. 2d, at 146 n. 2. This conduct by the respondents presents factual and legal questions to be resolved in the first instance by the

District Court, reviewable only on whether its factual findings are "clearly erroneous" and whether its ultimate conclusion is an "abuse of discretion" under all the circumstances of this case. *Ante,* at 17–18. In the same manner that the good faith of an employer may not be viewed in isolation as precluding backpay under any and all circumstances, the excusable nature of respondents' conduct, if found excusable, will not necessarily preclude denial of a backpay award if petitioners are found to have substantially and justifiably relied on respondents' prior representations.

If the award of backpay is indeed governed by equitable considerations, and not simply a thinly disguised form of damages, factors such as these and others, which may argue in favor of or against the equities of either plaintiff or defendants, must be open for consideration by the District Court. It, like the Labor Board, must avail itself "of the freedom given it by Congress under the Act to obtain just results in diverse, complicated situations." *Phelps Dodge* v. *NLRB,* 313 U. S. 177, 198 (1941).

SUPREME COURT OF THE UNITED STATES

Nos. 74–389 AND 74–428

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On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[June 25, 1975]

MR. CHIEF JUSTICE BURGER, concurring in part and dissenting in part.

I agree with the Court's opinion insofar as it holds that the availability of backpay is a matter which Title VII commits to the sound equitable discretion of the trial court. I cannot agree with the Court's application of that principle in this case, nor with its method of reviewing the District Court's findings regarding Albemarle's testing policy.

With respect to the backpay issue, it must be emphasized that Albemarle was not held liable for practicing overt racial discrimination. It is undisputed that it voluntarily discontinued such practices prior to the effective date of Title VII and that the statute does not—and could not—apply to acts occurring before its passage. The basis of Albemarle's liability was that its seniority system perpetuated the effects of past discrimination and, as the District Court pointed out, the law regarding an employer's obligation to cure such effects

was unclear for a considerable period of time. Moreover, the District Court's finding that Albemarle did not act in bad faith was not simply a determination that it thought its seniority system was legal but, rather, a finding that both prior to and after the filing of this lawsuit it took steps to integrate minorities into its labor force and to promptly fulfill its obligations under the law as it developed.[1]

In light of this background, the Court's suggestion that the District Court "conditioned" awards of backpay upon a showing of bad faith, *ante*, at 16, is incorrect. Moreover, the District Court's findings on this point cannot be disregarded as irrelevant. As the Court's opinion notes, one of Congress' major purposes in giving district courts discretion to award backpay in Title VII actions was to encourage employers and unions "to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." *Ante*, at 11. By the same token, if employers are to be assessed backpay even where they have attempted in good faith to conform to the law, they will have little incentive to eliminate marginal practices until bound by a court judgment. Plainly, then, the District Court's findings relate to "reasons which, if applied generally, would not frustrate the central statu-

[1] The District Court concluded that Albemarle was entirely justified in maintaining some type of seniority system which insured that its employees would have "a certain degree of training and experience." Its findings regarding the absence of bad faith were as follows:

"It appears that the company as early as 1964 began active recruitment of blacks for its Maintenance Apprenticeship Program. Certain lines of progression were merged on its own initiative, and as judicial decisions expanded the then existing interpretations of the Act, the defendants took steps to correct the abuses without delay." App., at 498.

tory purposes . . . ." *Ante*, at 14. Because respondents waited five years before changing their original position disclaiming backpay and belatedly seeking it, thus suggesting that a desire to be "made whole" was not a major reason for their pursuit of this litigation, I cannot say that the District Court abused its discretion by denying that remedy.[2]

The Court's treatment of the testing issue is equally troubling. Its entire analysis is based upon a wooden application of EEOC Guidelines which, it says, are entitled to "great deference" as an administrative interpretation of Title VII under *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971). The Court's reliance upon *Griggs* is misplaced. There we were dealing with Guidelines which state that a test must be demonstrated to be job-related before it can qualify for the exemption contained in § 703 (h) of Title VII as a device not "designed, intended or used to discriminate . . . ." Because this interpretation of specific statutory language was supported by both the Act and its legislative history, we observed that there was "good reason to treat the guidelines as expressing the will of Congress." 401 U. S., at 434. See also *Espinoza* v. *Farah Mfg. Co.*, 414 U. S. 86, 93–95 (1973).

In contrast, the Guidelines upon which the Court now relies relate to methods for *proving* job-relatedness; they interpret no section of Title VII and are nowhere referred to in its legislative history. Moreover, they are not federal regulations which have been submitted to public comment and scrutiny as required by the Administrative Procedure Act.[3] Thus, slavish adherence

[2] As the Court points out, *ante*, at 17 n. 20, the District Court's reasons for denying backpay were cumulative. It did not favor one policy of Title VII to the exclusion of all others, as I fear this Court is now doing.

[3] Such comment would not be a mere formality in light of the

to the EEOC Guidelines regarding test validation should not be required; those provisions are, as their title suggests, guides entitled to the same weight as other well-founded testimony by experts in the field of employment testing.

The District Court so considered the Guidelines in this case and resolved any conflicts in favor of Albemarle's experts. For example, with respect to the question whether validating tests for persons at or near the top of a line of progression "is a permissible measure of the minimal qualifications of new workers," *ante*, at 27, the District Court found:

> "The group tested was typical of employees in the skilled lines of progression. They were selected from the top and middle of various lines. Professional studies have shown that when tests are validated in such a narrow range of competence, there is a greater chance that the test will validate even a broader range, that is, if job candidates as well as present employees are tested." App., at 490–491.

Unless this Court is prepared to hold that this and similar factual findings are clearly erroneous, the District Court's conclusion that Albemarle had sustained its burden of showing that its tests were job-related is entitled to affirmance, if we follow traditional standards of review. At the very least, the case should be remanded to the Court of Appeals with instructions that it reconsider the testing issue, giving the District Court's findings of fact the deference to which they are entitled.

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fact that many of the EEOC Guidelines are not universally accepted. For example, the Guideline relating to "differential validation," upon which the Court relies in this case, *ante*, at 27–28, has been questioned by the American Psychological Association. See *United States* v. *Georgia Power Co.*, 474 F. 2d 906, 914 n. 8 (CA5 1974).

SUPREME COURT OF THE UNITED STATES

Nos. 74–389 AND 74–428

Albemarle Paper Company et al., Petitioners,
74–389 *v.*
Joseph P. Moody et al.

Halifax Local No. 425, United Papermakers and Paperworkers, AFL–CIO, Petitioner,
74–428 *v.*
Joseph P. Moody et al.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[June 25, 1975]

MR. JUSTICE BLACKMUN.

I concur in the judgment of the Court, but I do not agree with all that is said in the Court's opinion.

The statutory authority for making awards of backpay in Title VII cases is cast in language that emphasizes flexibility and discretion in fashioning an appropriate remedy:

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action *as may be appropriate, which may include,* but is not limited to, reinstatement or hiring of employees, *with or without* backpay . . . or any other equitable relief as the court deems appropriate." 42 U. S. C. § 2000e–5 (g) (emphasis supplied).

Despite this statutory emphasis on discretion, the Court of Appeals in this case reasoned by analogy to *Newman* v. *Piggie Park Enterprises,* 390 U. S. 400 (1968), that once a violation of Title VII had been established, "[back pay] should ordinarily be awarded . . . unless special circumstances would render such an award unjust." 474 F. 2d 134, 142 (CA4 1973). Today the Court rejects the "special circumstances" test adopted by the Court of Appeals and holds that the power to award backpay is a discretionary power the exercise of which must be measured against "the purposes which inform Title VII." *Ante,* pp. 8–10. With this much of the Court's opinion I agree. The Court goes on to suggest, however, that an employer's good faith is never a sufficient reason for refusing to award backpay. *Ante,* pp. 15–16. With this suggestion I do not agree. Instead, I believe that the employer's good faith may be a very relevant factor for a court to consider in exercising its discretionary power to fashion an appropriate affirmative action order. Thus, to take a not uncommon example, an employer charged with sex discrimination may defend on the ground that the challenged conduct was *required* by a State's "female protective" labor statute. See, *e. g., Kober* v. *Westinghouse Electric Corp.,* 480 F. 2d 240 (CA3 1973); *Manning* v. *International Union,* 466 F. 2d 812 (CA6 1972), cert. denied, 410 U. S. 946 (1973); *Schaeffer* v. *San Diego Yellow Cabs, Inc.,* 462 F. 2d 1002 (CA9 1972); *LeBlanc* v. *Southern Bell Telephone & Telegraph Company,* 460 F. 2d 1228 (CA5), cert. denied, 409 U. S. 990 (1972). In such a case, the employer may be thrust onto the horns of a dilemma: either he must violate Title VII or he must violate a presumptively valid state law. Even though good-faith reliance on the state statute may not exonerate an employer from a finding that he has intentionally violated Title VII, see, *e. g., Kober* v. *Westinghouse Corp., supra,*

compare, *ante.* p. 16 nn. 17–18, surely the employer's good-faith effort to comply with Title VII to the extent possible under state law is a relevant consideration in considering whether to award backpay. Although backpay in such a case would serve the statutory purpose of making the discriminatee whole, it would do so at the expense of an employer who had no alternative under state law and who derived no economic benefit from the challenged conduct.

I also agree with the decision of the Court to vacate the judgment of the Court of Appeals insofar as it appeared to require an injunction against all testing by Albemarle. I cannot join, however, in the Court's apparent view that absolute compliance with the EEOC Guidelines is a *sine qua non* of pre-employment test validation. The guidelines, of course, deserve that deference normally due agency statements based on agency experience and expertise. Nevertheless, the guidelines in question have never been subjected to the test of adversary comment. Nor are the theories on which the guidelines are based beyond dispute. The simple truth is that pre-employment tests, like most attempts to predict the future, will never be completely accurate. We should bear in mind that pre-employment testing, so long as it is fairly related to the job skills or work characteristics desired, possesses the potential of being an effective weapon in protecting equal employment opportunity because it has a unique capacity to measure all applicants objectively on a standardized basis. I fear that a too rigid application of the EEOC Guidelines will leave the employer little choice, save an impossibly expensive and complex validation study, but to engage in a subjective quota system of employment selection. This, of course, is far from the intent of Title VII.